In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5443

JAMES EDWARD BARNES, PETITIONER,

—v—

UNITED STATES OF AMERICA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

Chronological List of Important Docket Entries

Date	Proceedings
Oct. 18, 1971	Court appointed Malcolm H. Mackey as counsel for Defendant.
Oct. 18, 1971	Defendant pleaded not guilty, counts 1-8 and trial date set.
Nov. 16, 1971	Jury trial 1st day.
Nov. 17, 1971	Further jury trial, jury returns a verdict of guilty as to counts 1, 4, 5, 6, 7 and 8 and not guilty as to counts 2 and 3 and defendant referred to probation officer.
Dec. 13, 1971	Court ordered defendant committed to custody of attorney general to count 1, of the indictment and 3 years each as to counts 4, 5, 6 and 8 to run concurrently with each other.
Dec. 14, 1971	Notice of appeal filed by Defendant.
Jan. 5, 1972	Defendant motioned for reduction of sentence and for release on bail pending appeal.
Feb. 7, 1972	Court ordered bond set pending appeal.
Feb. 2[illegible], 1972	Motion to modify judgment and for credit for time spent in jail pending trial which was denied.
Aug. 22, 1972	Opinion and judgment of the court of appeals for the ninth circuit.
Jan. 15, 1973	Motion for trial pending writ of certiorari to United States Supreme Court.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

March 1971 Grand Jury

No. 8572

INDICTMENT

Count One

[18 U.S.C. § 1708]

On or about July 8, 1971, in Los Angeles County, within the Central District of California, defendant JAMES EDWARD BARNES unlawfully had in his possession the contents of a letter which had been stolen from the mail, addressed to Nettie Lewis, 10031 Sunnybrae Avenue, Chatsworth, CA 91311, and at said time and place defendant well knew said contents of said letter had been stolen.

Count Two

[18 U.S.C. § 1708]

On or about July 8, 1971, in Los Angeles, County, within the Central District of California, defendant JAMES EDWARD BARNES unlawfully had in his possession the contents of a letter which had been stolen from the mail, addressed to Albert W. Young, Box 6525, Los Angeles, California 90055, and at said time and place defendant well knew said contents of said letter had been stolen.

Count Three

[18 U.S.C. § 1708]

On or about July 8, 1971, in Los Angeles County, within the Central District of California, defendant JAMES BARNES, unlawfully had in his possession the contents of a letter which had been stolen from the mail, addressed to Arthur O. Salazar, Box 5737, Metro Sta, Los Angeles, California 90055, and at said time and place defendant well knew said contents of said letter had been stolen.

Count Four

[18 U.S.C. § 1708]

On or about July 8, 1971, in Los Angeles County, within the Central District of California, defendant JAMES EDWARD BARNES, unlawfully had in his possession the contents of a letter which had been stolen from the mail, addressed to Mary O. Hernandez, for children of Alfred P. Hernandez, P.O. Box 5034, Los Angeles, California 90055, and at said time and place defendant well knew said contents of said letter had been stolen.

Count Five

[18 U.S.C. § 495]

On or about July 8, 1971, in Los Angeles County, within the Central District of California, defendant JAMES EDWARD BARNES knowingly and wilfully forged on United States Treasury Check number 43,495,044 dated July 1, 1971, in the amount of $269.02, the endorsement and signature of the payee, Nettie Lewis, for the purpose of obtaining and receiving said amount from the United States, its officers and agents.

Count Six

[18 U.S.C. § 495]

On or about July 8, 1971, in Los Angeles County, within the Central District of California, defendant JAMES EDWARD BARNES, knowingly and wilfully forged on States, uttered and published as true United States Treasury Check number 43,495,044, dated July 1, 1971, in the amount of $269.02, bearing the purported endorsement of the payee, Nettie Lewis, which endorsement was forged, as the defendant then and there well knew.

Count Seven

[18 U.S.C. § 495]

On or about July 8, 1971, in Los Angeles County, within the Central District of California, defendant JAMES EDWARD BARNES, knowingly and wilfully forged on United States Treasury Check number 92,566,712, dated July 3, 1971, in the amount of $268.80, the endorsement and

signature of the payee, Mary O. Hernandez, for the purpose of obtaining and receiving said amount from the United States, its officers and agents.

Count Eight

[18 U.S.C. § 495]

On or about July 8, 1971, in Los Angeles County, within the Central District of California, defendant JAMES EDWARD BARNES, with intent to defraud the United States, uttered and published as true United States Treasury Check number 92,566,712, dated July 3, 1971, in the amount of $268.80, bearing the purported endorsement of the payee, Mary O. Hernandez, which endorsement was forged, as the defendant then and there well knew.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, PLAINTIFF,

—v—

JAMES EDWARD BARNES, DEFENDANT.

No. 8572-CD

APPEARANCES:

FOR UNITED STATES OF AMERICA:

ROBERT L. MEYERS, *United States Attorney,* Los Angeles, CA by:

RICHARD A. STILZ,
Assistant United States Attorney

FOR JAMES EDWARD BARNES:

MALCOLM H. MACKEY
215 W. Fifth St., Suite 1011
Los Angeles, CA 90013

STIPULATION BETWEEN RICHARD A. STILZ AND MALCOLM H. MACKEY

—0—

[Trans. Vol. 2, p. 15-16]

MR. STILZ: . . . Ladies and gentlemen of the jury, this is a stipulation signed by the Government, by the defendant and his counsel. It reads as follows:

"It is hereby stipulated by and between plaintiff, United States of America by its counsel of record, and defendant James Edward Barnes by his counsel of record as follows:

"That on or about July 1, 1971, the United States Disbursing Office at San Francisco, issued and mailed U.S. Treasury Check No. 43,495,044, in the sum of $269.02 to Nettie Lewis at 10031 Sunnybrae Avenue, Chatsworth, California 91311;

"That on or about July 3, 1971, the United States

Disbursing Office at San Francisco, issued and mailed U.S. Treasury Check No. 92,566,712, in the sum of $268.80 to Mary O. Hernandez for the children of Alfred P. Hernandez at P.O. Box 5034, Los Angeles, California 90055."

STENOGRAPHIC TRANSCRIPT OF NETTIE LEWIS' TESTIMONY:

[Trans. Vol. 2, p. 17-20]

DIRECT EXAMINATION
By MR. STILZ:

Q. Mrs. Lewis, on or about the months of June and July of this year were you a recipient of checks from the United States Government?

A. Yes.

Q. What was the purpose for the Government sending you these checks?

A. I was employed by the Federal Government and retired therefrom.

Q. Would they be retirement checks?

A. That is right.

Q. What is the approximate amount of each of these checks?

A. $269.

Q. How often did they come?

A. Once a month.

Q. When would your check for June come, would it come at the end of June or the beginning of July?

A. The end of June. I would receive them around the first though sometimes.

Q. Is it your testimony that they come at the end of June or the beginning of July?

A. The beginning of July.

Q. Where were these checks sent to you in June or July, what address?

A. Chatsworth, 10031 Sunnybrae Avenue.

Q. Did you receive your check from the Government for June?

A. No.

Q. Were you expecting the arrival of your June check?

A. Yes, of course.

Q. Have you ever authorized anyone to receive mail for you?

A. No.

Q. Have you ever authorized anyone to negotiate checks for you?

A. No.

Q. Do you know the defendant seated at counsel table in the blue shirt?

A. I don't know what to say. He looks like somebody that might have been working in that bank at that time.

Q. Do you know him personally?

A. No, not at all.

Q. Did you ever authorize the defendant to receive mail for you?

A. No.

Q. Did you ever at any time authorize the defendant to negotiate checks for you?

A. No.

MR. STILZ: May Government's Exhibit No. 2 be placed before the witness.

THE COURT: Yes.

(The exhibit referred to was passed to the witness.)

By MR. STILZ:

Q. Mrs. Lewis, I ask you to examine this Exhibit 2. Does this look like the United States Treasury check you got for annuity each month?

A. That's it.

Q. Is the person who this check is made out to you, you?

A. Yes.

Q. Is that your name appearing on the front of the check?

A. Yes.

Q. Is that the correct address that it was sent to in June or July?

A. Before I moved to Downey, yes, it was being sent there.

Q. I ask you to look at the back side of this check. Do you see the signature of Nettie Lewis?

A. No.

Q. Isn't there a signature?

A. It is my name but not my signature.

Q. Do you see a signature on the back Nettie Lewis?

A. Yes.

Q. Is that your signature?
A. No.

MR. STILZ: I have no further questions, your Honor.

STENOGRAPHIC TRANSCRIPT OF MARY O. HERNANDEZ' TESTIMONY:

[Trans. Vol. 2, p. 27-30]

DIRECT EXAMINATION

By MR. STILZ:

Q. Mrs. Hernandez, on or about the months of June or July of this year were you a recipient of checks from the United States Government?
A. Yes.
Q. What was the purpose of the United States Government sending you these checks?
A. They are Social Security benefits for my children.
Q. What is the approximate amount of each check they send you?
A. $268.80.
Q. How often do these checks come?
A. Every month.
Q. Do they come at the beginning or at the end of the month?
A. The end of the month.
Q. Would it be your testimony that your check for June would come at the end of June or the beginning of July?
A. The beginning of July.
Q. Where were these checks sent to each month in June or July?
A. To my Post Office Box 5034.
Q. Is that in Los Angeles?
A. Yes, at Eighth and Broadway.
Q. Did you receive your Social Security check from the Government for June of this year?
A. No, I didn't.
Q. Were you expecting the arrival of your June check?
A. Yes.
Q. Did you ever authorize anyone to receive mail for you?
A. No.
Q. Have you ever authorized anyone to negotiate checks for you?

A. No.

Q. Do you know the defendant seated at counsel table in blue?

A. No.

Q. Did you ever authorize the defendant to receive mail for you?

A. No, sir.

Q. Have you ever at any time authorized the defendant to negotiate checks for you?

A. No.

MR. STILZ: I ask at this time Government's Exhibit No. 5 for identification be place before the witness.

(The exhibit referred to was passed to the witness.)

By MR. STILZ:

Q. Mrs. Hernandez, I ask you to look at the exhibit and examine it. Does this look like the Social Security check you get from the Government each month?

A. Yes.

Q. Is the person who this check is made out to you?

A. Yes.

Q. Is the correct address appearing on the front of this check?

A. Yes.

Q. I ask you to look at the back side of this check. Do you see the signature Mary O. Hernandez?

A. Yes.

Q. Is that your signature?

A. It is my name but not my signature.

Q. Did you sign Mary O. Hernandez there?

A. No.

Q. Did you ever authorize anyone to sign that signature on the back of that check?

A. No.

STENOGRAPHIC TRANSCRIPT OF ELEANOR FERRELL'S TESTIMONY:

[Trans. Vol. 2, p. 30-31]

DIRECT EXAMINATION

By MR. STILZ:

Q. Mrs. Ferrell, on or about June 2, 1971 for whom were you employed?

A. Crocker National Bank at 2745 West Manchester in Inglewood.

Q. In what capacity?

A. Clerk-steno.

Q. Were you working on June 2, 1971, in this bank?

A. Yes.

Q. On this date, which is June 2, 1971, did a man open up an account at your bank under the name of Clarence Smith?

A. Yes.

Q. Is that man present in court today?

A. Yes.

Q. Would you please identify him?

A. He is sitting there in the blue shirt.

MR. STILZ: May the record reflect the witness has identified the defendant?

THE COURT: Yes.

By MR. STILZ:

Q. What transpired at the time the account was opened by the defendant?

A. Well, he came to the new accounts counter and wanted to open a checking account. He was given a standard form for opening up the account and he filled them out and signed the back of it and made a deposit.

Q. What name did he use?

A. Clarence Smith.

Q. Is this the name you know him by?

A. Yes.

STENOGRAPHIC TRANSCRIPT OF ELMA DANAT'S TESTIMONY:

[Trans. Vol. 2, p. 33-35]

DIRECT EXAMINATION

By MR. STILZ:

Q. Miss Danat, directing your attention back to July 8th of this year, by whom were you employed?

A. Crocker National Bank at Western and Third.

Q. Were these the four United States Treasury checks deposited by the defendant on July 8th?

A. Yes, they were.

Q. How can you tell that these are the four checks?

Q. So you know definitely that the defendant deposited those four checks on July 8th?

A. Yes.

Q. At your branch?

A. Yes.

Q. When the defendant deposited these four checks, were they all endorsed with the purported signature of the payees?

A. Yes.

Q. Were they all second endorsed Clarence Smith?

A. Yes.

Q. Is it your testimony that the defendant deposited these four United States Treasury checks on July 8 of this year?

A. Yes.

STENOGRAPHIC TRANSCRIPT OF CHARLES P. NELSON:

[Trans. Vol. 2, p. 48-52]

DIRECT EXAMINATION

By MR. STILZ:

Q. Mr. Nelson, I will start back at the beginning of your testimony. By whom are you employed?

A. By the Post Office Department.

Q. In what capacity?

A. As a postal inspector.

Q. Were you so employed in that capacity on July 20, 1971?

A. Yes.

Q. On that date did there come a time when you had an interview and conversation with the defendant?

A. Yes.

Q. Who was present?

A. In addition to me Postal Inspector Jack Nelson and the defendant.

Q. Did you advise the defendant of his constitutional rights from Miranda prior to questioning him?

A. Yes, I did.

Q. What rights did you advise him of?

A. I told him that he had the right to remain silent, I

told him that anything he did say could later be used against him in court, and told him that he had the right to have an attorney present at any time and that if he was unable to afford an attorney the Government would appoint one for him, I told him that if he was willing to answer questions without an attorney present that he still had the right to stop answering at any time or decline to answer any certain questions.

Q. Do you recognize this exhibit?

A. Yes, I do.

Q. What is it?

A. It is what we refer to as a waiver of rights form. It has the rights I just mentioned up here on the top and a paragraph covering a waiver.

Q. Did the defendant sign this form?

A. Yes, he did.

Q. Did you sign it?

A. Yes.

Q. Did you see the defendant sign the form?

A. Yes, I did.

Q. After advising the defendant of his rights and the defendant waiving those rights, what did you say and what did the defendant say?

A. I asked him if he could give me any information regarding the Clarence Smith bank account and the four Treasury checks that are involved in this case. He told me that he had opened the Clarence Smith account at the Crocker Citizens Bank in Inglewood about the 1st of June. He said he was in the furniture business and that he had received the checks from what he referred to as dudes and chicks who went door to door selling furniture. He said the checks were signed when he received them.

I asked him if he had any data to prove that he had furniture orders. He said no, that they took their orders on scratch paper and that he did not have the orders. I asked him if he could identify the sales people. He told me that he could not.

I asked him if he had signed any of the payees' endorsements on the checks. He said, no, he hadn't that he only had signed the endorsement Clarence Smith and he acknowledged depositing them in the bank account.

STENOGRAPHIC TRANSCRIPT OF CHARLES P. NELSON:

[Trans. Vol. 2, p. 53-55]

CROSS EXAMINATION
By MR. MACKEY:

Q. You had no problem getting cooperation from Clarence Smith, also known as Mr. Barnes?

A. No.

Q. And you asked him certain questions and he gave you certain answers, I take it?

A. Yes.

Q. He told you that he was operating a furniture business, did he tell you that?

A. Yes, he did.

Q. And did he say he operated his business at 3927 South Western Avenue in Los Angeles?

A. I can't recall if that is the address. I know he said it was an address on South Western.

Q. And that he was living at 4060 Buckingham, did he tell you that?

A. Yes.

Q. And that he worked out of his office selling furniture from brochures?

A. Yes, that is right.

Q. That when he said dudes and chicks he was using a colloquial term, I guess, as to men and women who were going from door to door for him?

A. That is what I assumed, yes.

Q. And that they brought back checks to him?

A. Yes.

Q. And that these peiople worked and wrote their orders on scratch pads, did he tell you that?

A. He referred to scratch paper.

Q. But that he didn't have any order forms at that time?

A. Yes.

Q. He admitted signing Clarence Smith to all these checks, did he not?

A. Yes, he did.

Q. But did he deny that he signed the payees' names, Nettie Lewis or Salazar, the people who were here prviously.

A. Yes, that is true.

Q. Did he also tell you that he had an account at the First Western Bank on Santa Barbara?

A. I remember him telling me he had an account at the First Western Bank. I can't tell whether it was on Santa Barbara or not.

Q. He also acknowledged making the deposit slip in the Crocker Citizens Bank?

A. Yes, he did.

MR. MACKEY: That is all I have, your Honor.

STENOGRAPHIC TRANSCRIPT OF GEORGE W. LEWIS:

[Trans. Vol. 2, p. 58-59]

DIRECT EXAMINATION
By MR. STILZ:

Q. Did you use these handwriting exemplars in the analysis and comparison of the defendant's handwritings?

A. Yes, I did.

Q. What did you compare these exemplars to?

A. To the four United States Treasury checks, which are Exhibits 2 through 5.

Q. As a result of your examination and based on your training and experience have you reached a conclusion?

A. Yes, I have.

Q. What is the conclusion?

A. It is my conclusion that the Nettie Lewis signature on Exhibit 2 was written by Mr. Barnes, and it is also my conclusion that the Mary O. Hernandez signature on Exhibit 5 was written by Mr. Barnes.

And it again is my opinion that the four Clarence Smith second endorsements on the four Treasury checks, which are Exhibits 2 through 5, were also written by Mr. Barnes.

* * * *

JURY INSTRUCTIONS

[Trans. Vol. 2, p. 115]

1. It is not required that the Government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

[Trans. Vol. 2, p. 117-118]

2. Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

A presumption is a rule of law which permits the jury to find the existence of one fact from proof of another fact.

A presumption may be overcome by evidence. Your duty is to determine the facts on the basis of all of the evidence.

[Trans. Vol. 2, p. 120]

3. As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

[Trans. Vol. 2, p. 121-122]

4. Title 18, United States Code, Section 1708 provided in part:

"Whoever . . . has in his possession any letter . . . knowing the same to have been stolen, taken or embezzled or abstracted . . ." shall be guilty of an offense against the United States Government.

Three essential elements are required to be proved in order to establish the offense charged in Counts 1 through 4 of the indictment:

FIRST: The act or acts of unlawfully having in one's possession the contents of a letter, namely, the United States Treasury checks as alleged;

SECOND: That the contents of the letter, namely, the United States Treasury checks as alleged, were stolen from the mail; and

JURY INSTRUCTIONS CONT'D.

THIRD: That the defendant James Edward Barnes knew the contents had been stolen.

[Trans. Vol. 2, p. 123-124]

5. Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property.

The term "recently" is relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

If you should find beyond a reasonable doubt from the evidence in the case that the mail described in the indictment was stolen, and that while recently stolen the contents of said mail here, the four United States Treasury checks, were in the possession of the defendant you would ordinarily be justified in drawing from those facts the inference that the contents were possessed by the accused with knowledge that it was stolen property, unless such possession is explained by facts and circumstances in this case which are in some way consistent with the defendant's.

• • • •

6. Title 18, United States Code, Section 495, provides in part:

"Whoever falsely makes, alters, forges, or counterfeits any . . . writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States, any officers or agents thereof, any sum of money; or

JURY INSTRUCTIONS CONT'D.

"Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited . . ."
shall be guilty of an offense against the laws of the United States.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, PLAINTIFF,

—v—

JAMES EDWARD BARNES, DEFENDANT.

No. 8572

VERDICT

The jury in the above-entitled case, found the defendant, JAMES EDWARD BARNES, guilty as charged in Counts 1, 4, 5, 6, 7, 8, and *not* guilty in Counts 2 and 3.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

—VS—

JAMES EDWARD BARNES, DEFENDANT-APPELLANT.

No. 72-1106

[August 22, 1972]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIF.

Before: BROWNING, ELY, and KILKENNY, *Circuit Judges.*

ELY, *Circuit Judge:*

Barnes appeals from his conviction, by a jury, on six charges arising out of his alleged efforts to forge and utter stolen United States Treasury checks. Two of the counts related to Barnes' possession of stolen mail (i.e., the checks), in violation of 18 U.S.C. § 1708. The other four concerned violations of 18 U.S.C. § 495, two for forging endorsements on the checks, and two for depositing those forged instruments into a bank account. Barnes challenges all six convictions.

Those under section 1708 are attacked on two grounds. First, Barnes contends that the evidence was insufficient. There is no merit to this contention. At trial the prosecution demonstrated, or Barnes conceded, that (1) the checks involved were stolen from the mails between July 1st and 8th, 1971; (2) on July 8, 1971, Barnes deposited the checks in an account opened only a month earlier under the name of "Clarence Smith," and (3) both the payees' and "Smith's" endorsements were written by Barnes. When this evidence is viewed, as it must be, in the light most favorable to the Government, it is more than adequate to sustain the prosecution's case. The jury could justifiably determine from his actions, that Barnes knew the checks had been stolen; thus, the conviction was supported by the evidence. See *United States v. Gardner*, 454 F.2d 534 (9th Cir. 1972).

Barnes' other argument is that the District Court erred in instructing the jury that it might infer, from the fact that Barnes possessed recently stolen checks, that he knew they had been stolen.[1] He argues that that instruction, upon which the jury may have relied in reaching the guilty verdicts, violates both his Fifth Amendment due process rights and his privilege against self-incrimination. Under his theory, the former were violated because the allowed inference not only shifted the burden of proof on the issue of knowledge from the Government to him, but also that it does not reflect the required nexus between the fact proved and the fact inferred. Cf. *United States v. Leary*, 395 U.S. 6, 23 L.Ed.2d 57, 89 S.Ct. 1532 (1969). The privilege against self-incrimination was infringed, argues Barnes, because the jury was permitted, by the terms of the instruction, to infer Barnes' guilt from his silence.

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[1] The challenged instruction reads:

"possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

"However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property.

"The term 'recently' is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft, the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

"If you find beyond a reasonable doubt from the evidence in the case that the mail described in the indictment was stolen and that while recently stolen, the contents of said mail here, the four U.S. Treasury checks, were in the possession of the defendant, you would ordinarily be justified in drawing from those facts the inference that the contents were possessed by the accused with knowledge that it was stolen property; unless such possession is explained by facts and circumstances in this case which are in some way consistent with defendant's innocence.

"Possession may be satisfactorily explained through other circumstances other evidence, independent of any testimony of the accused."

This instruction is functionally identical to that recently analyzed and condemned in United States v. Cameron, ——F.2d—— No. 71-3138 (5th Cir. June 1, 1972), see text, infra.

Although Barnes is supported in his latter contentions by a case recently decided by our Brothers of the Fifth Circuit, *United States v. Cameron,* —— F.2d —— No. 71-3138 (5th Cir. June 1, 1972), we cannot accept his views for two reasons. First, a contrary rule has already been established by our court. The challenged instruction and the inference it permits have been generally approved. See, e.g., *United States v. Gardner, supra.* Secondly, we can see no substantial basis for holding, as Barnes suggests we should, that as a matter of law, the District Court should have rejected the inference instruction because of the weakness of any proved connection between the theft and Barnes' subsequent possession. While, in some circumstances, such rejection might be required (Cf. United States v. Leary, supra), we cannot here hold that permitting the jury to infer knowledge from Barnes' possession was impermissible because of any "lack of a rational connection between [them] in common experience." *Tot v. United States,* 319 U.S. 463, 467-68, 87 L.Ed. 1519, 63 S. Ct. 1241 (1943). See also *Leary v. United States,* supra, at 30-36, 23 L.Ed.2d 57, 89 S. Ct. 1532 (1969).

Since Barnes received concurrent sentences on all six counts, we need not and do not, consider whether any of the others is susceptible to the various attacks that Barnes makes. See, e.g., *United States v. Moore,* 452 F.2d 576 (9th Cir. 1971).

AFFIRMED

SUPREME COURT OF THE UNITED STATES

No. 72-5443

JAMES EDWARD BARNES, PETITIONER,

v.

UNITED STATES

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

DECEMBER 4, 1972

☆ U.S. Government Printing Office: 1973—492-664/453

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5443

JAMES EDWARD BARNES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Ninth Circuit affirming the conviction of the petitioner of six charges arising out of his alleged efforts to forge and utter stolen U.S. treasury checks and possession of stolen mail (A. 19-21) is reported in *United States v. Barnes*, 466 F.2d 1361.

JURISDICTION

The judgment of the court of appeals (A. 19-21) was entered August 22, 1972 and a petition for a writ of certiorari was filed on September 21, 1972. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Eighth Amendment:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

18 U.S.C. §495 Contracts, deeds, and powers of attorney:

Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited–

Shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

Title 18 U.S.C. §1708 Theft or receipt of stolen mail matter generally

Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card,

package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or

Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein; which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both. As amended May 24, 1949, c. 139, § 39, 63 Stat. 95; July 1, 1952, c. 535, 66 Stat. 314.

QUESTIONS PRESENTED

1. Was the evidence sufficient to show that defendant had in his possession stolen mail which he knew was stolen?

2. Was there error in giving the jury instructions that possession of recently stolen mail gives an inference that the person in possession knew the property had been stolen?

3. Was the evidence sufficient to show that the defendant had forged or uttered the checks?

4. Does the conviction of forgery and uttering constitute double punishment for the same offense?

STATEMENT OF THE CASE

A. Facts

The appellant JAMES EDWARD BARNES, hereafter to be referred to as the defendant, was indicted on July 8, 1971, on an eight count indictment, but was convicted of the following six counts only:

Count One, for having unlawfully a letter in his possession addressed to Nettie Lewis which he knew was stolen.

Count Four, having a letter addressed to Mary O. Hernandez which he knew was stolen.

Count Five, That he wilfully forged a United States Treasury Check dated July 1, 1971, in the amount of $269.02, payable to Nettie Lewis.

Count Six, that defendant uttered and published a United States Treasury Check which defendant knew was forged.

Count Seven, that defendant forged a United States Treasury Check dated July 3, 1971, in the amount of $268.80, payable to Mary O. Henandez.

Count Eight, that defendant uttered and published a United States Treasury Check for $268.80.

Trial by jury in this case commenced before the Honorable David W. Williams on November 16, 1971 (A. 1).

At the beginning of the trial, a Stipulation (A.5 & 6) was received in evidence and thereafter read to the jury as follows:

"That on or about July 1, 1971, the United States Disbursing Office at San Francisco, issued and mailed U.S. Treasury Check No. 43,495,044, in the sum of $269.02 to Nettie Lewis at 10031 Sunnybrae Avenue, Chatsworth, California 91311;

"That on or about July 3, 1971, the United States Disbursing Office at San Francisco, issued and mailed U.S. Treasury Check No. 20,461,930, in the sum of $154.70 to Albert W. Young at P.O. Box 6525, Los Angeles 55, California 90055;

"That on or about July 3, 1971, the United States Disbursing Office at San Francisco, issued and mailed U.S. Treasury Check No. 65,072,365, in the sum of $184.00 to Arthur O. Salazar at P.O. Box 5737 Metro Sta., Los Angeles, California 90055; and

"That on or about July 3, 1971, the United States Disbursing Office at San Francisco, issued and mailed U.S. Treasury Check No. 92,566,712, in the sum of $268.80 to Mary O. Hernandez for the children of Alfred P. Hernandez at P.O. Box 5034, Los Angeles, California 90055" (A.5-6)

After the above Stipulation was read to the jury, the Government called to the witness stand all four of the respective payees of the above four U.S. Treasury Checks that were stipulated to being mailed.

Defendant admitted having possession of the checks, but denied that he knew they were stolen and denied the forgery or uttering of these checks.

Defendant claimed he received the checks from third parties who were his part-time salesmen for his used furniture store. He admits the second endorsement of "Clarence Smith" on the checks, but denied forging the names of the payees on the drafts. (A. 12-14)

The case was tried before a jury in the Courtroom of the Honorable David W. Williams, United States District Judge, on November 16 and 17, 1971. The defendant did not take the witness stand to testify in the course of the trial. [U.S.D.C., Central Div. #8572-CD]

On November 17, 1971, the jury returned a verdict of guilty on six counts of the eight-count indictment. The defendant was sentenced to imprisonment for a period of three years (A. 8)

SUMMARY OF ARGUMENT

The evidence was insufficient to show that the defendant had in his possession the stolen mail which he knew was stolen.

Further, the giving of the jury instructions that possession of recently stolen mail, gives an inference that the person in possession knew the property had been stolen, was in error and violated defendant's constitutional right in that it created an inference of his guilt in violation of the Fifth and Sixth Amendment. There must be a rational connection between the facts proved and the facts presumed.

Here, the inference is arbitrary and lacks connection in common sense to equate an inference that possession equals knowledge.

That the inference of guilt (from failure of defendant to testify) as a practical matter tends to shift the burden to the defendant and however piously we may state to the jury this is wrong.

The delivery of the "unexplained possession" instruction in this case, however, went too far towards circumscribing the appellant's constitutionally protected

privilege to remain silent during his trial. The appellant having been charged with the offense of possession, it is altogether possible that when the jury heard the "unexplained possession" charge, it concluded that the appellant was under a legal obligation to come forward with an explanation of his possession of the checks and that this obligation could be satisfied only through the trial testimony of the appellant.

We request the court to again reconsider the inference for it clearly establishes the burden of proof. The key test would appear to be as follows: that where the defendant did not testify or take the stand and this inference instruction is given, is there enough evidence to convict him?

If the answer to this question asked is in the affirmative, then defendant's failure to take the stand is apparently held against him; which would clearly violate the Fifth and Sixth Amendments to the Constitution.

Here, just as in the "*Cameron* case" the giving of the "unexplained possession of recently stolen property" charge to the jury in this case prejudiced the substantial rights of the defendant in two respects:

(1) It permitted the jury to infer the facts of knowledge, one element of the offense, from the fact of possession, the other element of the offense and

(2) It improperly infringed the appellant's privilege against compulsory self-incrimination under the Fifth Amendment to the United States Constitution.

With regards to the first point, the "unexplained possession" charge clearly had the effect, whether intended or not, of enabling the United States to pyramid the requisite element "knowledge" on top of the

requisite element of "possession" without the necessity of the prosecution's coming forward with a single additional evidentiary fact bearing on the appellant's knowledge of the stolen character of the checks.

Therefore, the "unexplained possession" instruction substantially prejudiced defendant's rights.

That from the jury instructions inferences are deductions from facts which have been established by evidence.

The combination of instructions created a limitation on the Fifth Amendment by creating facts which the defendant cannot rebut unless he takes the witness stand. At the risk of being provintial, the enlightened State of California does not have any similar jury instruction which equated knowledge to possession. This writer hopes the court will strike down this inference under the Fifth and Sixth Amendment.

Further the conviction of forgery and uttering constitutes a double punishment for the same offense and is a cruel and unusual punishment under the Eighth Amendment.

The government has never replied in their prior briefs to cruel and unreasonable punishment argument of appellant. Certainly the people could elect after a conviction whether this was forgery or an uttering rather than have the defendant convicted of two additional counts.

Certainly the greater (here forgery) includes the lesser, uttering and it would seem a cruel and unusual punishment to convict the defendant for both. If a person commits a murder, he also commits an assault and battery and a host of other crimes incidental thereto; and in that case, the greater includes the lesser. It would seem that this logic should also apply to this case.

The government, however, argues that this does not make a difference when defendant is convicted on multiple counts if he is sentenced as to only one and that it is unnecessary for the court to consider this point.

This argument seems ludicrous where a person has to put all his convictions on a job application and if he is in violation of his parole, he may now have to face a harsher sentence because of his conviction on multiple counts.

"We, therefore, conclude that the 'unexplained possession' instruction in the context of this case, substantially prejudiced the appellant's rights and accordingly we request the matter be sent back to the district court for a new trial."

Further, lumping together the charges of possession, forgery and uttering, is like putting sugar in coffee, for it is difficult for the jury to separate; therefore, a new trial is requested. Further the defendant was denied equal protection by the failure of the government to supply him with an independent handwriting expert.

ARGUMENT

I.

WAS THE EVIDENCE SUFFICIENT TO SHOW THAT DEFENDANT HAD IN HIS POSSESSION STOLEN MAIL WHICH HE KNEW WAS STOLEN?

The jury was instructed (A. 15-16) as follows:

"Title 18, United States Code, Section 1708 provides in part:

"Whoever . . . has in his possession any letter . . . or any article or thing contained therein, which has been stolen, taken, embezzled or abstracted . . . knowing the same to have been stolen, taken or embezzled or abstracted . . . [shall be guilty of an offense against the United States Government.]"

Defendant was putting these drafts in his own account at the Crocker Citizens Bank, and since defendant did not take the witness stand, there is no proof to show, in Counts One and Four, that he knew the items were stolen from the mails.

Defendant submits that the Government is required to prove that defendant knew the items were stolen from the United States Mail.

On the above issue, there is a marked split of authority. A few cases are: *United States v. Weeks,* 327 F.2d 656 (2d Cir. 1964); *United States v. Hines,* 256 F.2d 561 (2d Cir. 1958); *Smith v. United States,* 343 F.2d 539, 543 (5th Cir. 1965); *Wilburn v. United States,* 327 F.2d 656 (5th Cir. 1964).

The better reasoned cases, however, hold that the prosecution must establish that the defendant knew the items were stolen from the United States Mail. *Allen v. United States,* 387 F.2d 641, 642; *Webb v. United States,* 347 F.2d 363, 364 (10th Cir. 1958).

The problem with the line of cases starting with *United States v. Weeks,* 327 F.2d 656, *supra,*, is that they do not require the accused to know that the articles were stolen from the United States Mail, but only, that the articles were stolen.

What we run into is the dual sovereignty concept between the State and Federal governments. The only way to properly tie in Federal jurisdiction is to require that the defendant knew these articles were stolen from the United States Mail.

It is apparent in this case that around July 1, 1971, certain checks were taken from the mail, but there is *no* proof that defendant took those items from the mail. His

defense is that certain parties gave him these checks as payment for furniture. (A. 12-13)

There is no showing that defendant or anyone who worked with him obtained these items from the mails. There are a hundred and one ways the defendant could have obtained these items other than the mail. Defendant did not take the witness stand, so there is no way to show he knew those items were stolen from the mail. He could have been given the checks by other persons, or he could have found the checks.

If defendant were caught taking the checks, or found with the envelopes and the checks, then this would certainly comply with the 18 U.S.C. 1708, and also if a conspiracy were shown to steal mail and defendant aided in this conspiracy.

Here there is no evidence to show that the defendant knew that these articles were stolen from the United States mail, but also, there is no evidence to show that defendant knew the mail was stolen. The fact that an inference that items were recently stolen from the mail is insufficient to show knowledge either that the defendant knew the items were stolen from the mail or that they were stolen.

Further in this case there were no confessions or admissions, and the defendant did not take the witness stand; and, therefore, the convictions as to possession of stolen checks should be reversed.

II.

WAS THERE ERROR IN GIVING THE JURY INSTRUCTIONS THAT POSSESSION OF RECENTLY STOLEN MAIL GIVES AN INFERENCE THAT THE PERSON IN POSSESSION KNEW THE PROPERTY HAD BEEN STOLEN?

The jury was instructed by the Court as follows:

Court's Instruction (A. 16)

"Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

"However, you are never required to make this inference. If it is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property.

"The term 'recently' is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen, depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft, the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

"If you find beyond a reasonable doubt from the evidence in the case that the mail described in the indictment was stolen, and that, while recently stolen, the contents of said mail here, the four U.S. Treasury Checks, were in the possession of the

respective defendant, you would ordinarily be justified in drawing from those facts the inference that the contents were possessed by the accused with knowledge that it was stolen property; unless such possession is explained by facts and circumstances in this case which are in some way consistent with the defendant's innocence

"In considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that, in the exercise of constitutional rights, the accused need not take the witness stand and testify.

"Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the accused." [Citations omitted].

The question here is: "Does such an instruction violate the *Fifth* and *Sixth Amendments* to the *Constitution of the United States,* where the defendant did not take the witness stand?

[Fifth Amendment] "Right to Protection of Persons and Property."

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[Sixth Amendment] "Rights of Persons Accused of Crime"

"In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which districts shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." [Sixth Amendment] [Bill of Rights . . . The Constitution of the United States, December 15, 1971.]

It is safe to state that prior to *United States v. Leary*, 395 U.S. 6, that this inference was allowed.

Even after the *Leary* case, *supra*, some courts have followed *Clavin v. United States*, 396 F.2d 725, including the Ninth Circuit, again, in *United States v. Gardner* (January 10, 1972). See also: *McAbee v. United States*, 434 F.2d 363; and *United States v. Prujansky*, 415 F.2d 1045 (1967), which allowed this inference.

The appellant herein again requests the court to reconsider this matter in the light of the *Leary* case.

In the opinion of the Court in that case (*Leary, supra*), the Court states:

"The Court, relying upon a prior decision in a civil case, held that the 'controlling' test for determining the validity of a statutory presumption was 'that there be a rational connection between the facts proved and the facts presumed.' [Quoting in their opinion, the case of *Tot v. United States*, 319 U.S. 463 (1943)] the Court stated [in the *Tot* case, *supra*]:

"Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts.' " 319 U.S., at 467-468 (footnotes omitted).

Then at page 36 Opinion in the *Leary* case, *supra*, the Court further stated:

" 'Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt—the inference of the one from proof of the other is arbitrary . . .' " *Tot v. United States*, 319 U.S. 463, 467. *Ibid.*

"The upshot of Tot, Gainey, and Romano is, we think, that a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. And in the judicial assessment the congressional determination favoring the particular presumption must, of course, weigh heavily." [*Leary, supra*, 395 U.S. at p. 36]

See also: *Rodgers v. United States*, 402 F.2d 839, 834 (9th Cir.) in which the Court said:

"Possession of a stolen car within a state is not a federal offense. The government has a heavy burden of proof in a criminal case; the defendant has none. The inferences (they are sometimes called presumptions) arising from possession relieve the government of much of that burden. As a practical matter, they tend to shift the burden to the defendant, however, piously we may say and tell juries that they do not. Therefore, when the government's case includes an 'explanation', the apparent validity of which is not offset by any substantial evidence, we think that the government is no longer entitled to the inference—it has not really met its heavy burden of proof."

Appellant feels that this case can be distinguished from the case of the *United States v. Gardner* (9th Cir. 1972), 454 F.2d 534. In that case the checks were placed in a mail box on June 11, and the very next day defendant Gardner took them to the bank. The present case differs, in that the facts set forth in the Gardner case do not apply for the checks in the present case were taken on July 1st and 3rd and were placed in defendant's own bank account on July 8th. Further, we request the Court to again reconsider the inference, for it clearly establishes the burden of proof. The key test would appear to be as follows: That where the defendant did not testify or take the stand and this inference instruction is given, is there enough evidence to convict him? If the answer to the question asked is in the affirmative, then defendant's failure to take the stand is apparently held against him; which would clearly violate the *Fifth* and *Sixth Amendments* to the *Constitution*.

The court in the *Rodgers* case, *supra*, indicates that that inference [of guilt for failure to testify], as a practical matter, tends to shift the burden to the

defendant, however piously we may state to juries that this is wrong.

See also *U.S. v. Cameron*, 460 F.2d 1394, in which case the court said:

"II. THE CONVICTION UNDER COUNT 1

"Over the objection of appellant's counsel, the district judge charged the jury, in part, as follows:

'Now, there was some evidence here that money taken from the Brooks Field National Bank had been recently stolen. Possession of property recently stolen if not satisfactorily explained is ordinarily a circumstance from which the jury may reasonably draw the inference and find in the light of surrounding circumstances shown by the evidence in the case that the person in possession knew that the property had been stolen. Ordinarily the same inferences may reasonably be drawn from a false explanation of possession of recently stolen property. The term "recently" is a relative term and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property and all of the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft, the more doubtful becomes the inference which may be reasonably drawn from unexplained possession.

'Of course, there is no evidence in this case, and the government does not contend, that Mr. Cameron stole any money, that he had anything to do with stealing any money from the Brooks Field National Bank. If you find beyond a reasonable doubt from the evidence in the case that the money described in the indictment was stolen and that while recently stolen the property was in the possession of the accused, you may, from these facts, draw the

inference that the money was possessed by the accused with knowledge that it had been stolen, unless possession of the recently stolen property by the accused is explained to the satisfaction of the jury by other facts and circumstances in the case. In considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of Constitutional rights the accused need not take the witness stand and testify. There may be opportunities to explain possession by showing other facts and circumstances independent of the testimony of a defendant.

'You will always bear in mind, ladies and gentlemen, that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in the case warrant any inference which the law permits you to draw from possession of recently stolen property. I don't tell you that you have to draw "an inference." I simply say that you may do it if you wish to do it. In the final analysis, whether you draw an inference or whether you don't draw an inference is exclusively within your province.

'If any possession the accused may have had of recently stolen property is consistent with innocence or if you entertain a reasonable doubt as to the guilt of the defendant, you must acquit the accused. I am not suggesting to you that the defendant has possession of the money. This is also for you to find, but I give you the law for you to use as a guide in making a determination in your own mind as to the guilt or innocence of the defendant under the law.

'In the district court, counsel for the appellant argued with persistance and vigor that the above instruction infringed his client's Fifth Amendment privilege against self-incrimination. Cameron elected not to testify during the trial. Here the appellant presents a similar Fifth Amendment argument pertaining to the instruction. The United States counters by referring us to three of our decisions dealing with prosecutions under the Dyer Act, Title 18, U.S.C. Section 2311 *et seq.*: *Hale v. United States*, 410 F.2d 147 (5 Cir. 1969), cert. denied 1970, 396 U.S. 902, S.Ct. 216, 24 L.Ed.2d 179; *Welch v. United States*, 386 F.2d 189 (5 Cir. 1967), and *Brown v. United States*, 342 F.2d 419 (5 Cir. 1965).

'Unlike Section 2113(c), the Dyer Act[5] does not prescribe the "possession" of a stolen motor vehicle or aircraft. The accused in *Hale, supra*, was charged with the interestate transportation of a stolen vehicle; in *Welch, supra*, the accused was alleged to have received stolen motor vehicle; and in *Broom, supra*, the accused was charged with the sale of a stolen automobile. In each of these three cases, we held that the trial court did not err in instructing the

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[5] Title 18, U.S.C. §2312 provides:

"Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Title 18, U.S.C. §2313 provides:

"Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

jury as to the inference which it could draw from the unexplained possession of recently stolen property.

'In the case *sub judice,* however, the appellant was charged with the knowing possession of currency stolen from a federally-insured bank. The United States was required to prove, beyond a reasonable doubt, that the appellant possessed the bills in question and that he knew that the bills were stolen when he had them in his possession. We believe that the delivery of the "unexplained possession of recently stolen property" charge to the jury in this case prejudiced the substantial rights of the appellant in two respects: (1) it permitted the jury to infer the fact of knowledge, one element of the offense, from the fact of possession, the other element of the offense; and (2) it improperly infringed the appellant's privilege against compulsory self-incrimination under the Fifth Amendment to the United States Constitution.

'With regard to the first point, the "unexplained possession" charge clearly had the effect, whether intended or not, of enabling the United States to pyramid the requisite element "Knowledge" on top of the requisite element of "possession" without the necessity of the prosecution's coming forward with a single additional evidentiary fact bearing on the appellant's knowledge of the stolen character of the checks. We have heretofore approved the use of such an instruction only where the defendant has been charged with an offense other than the possession of stolen property, such as the receipt, transportation, concealment, or sale of the item or items involved. Phrased simply, we are unwilling to approve the delivery of such an advice to the jury where, as in this case, the accused is alleged to have violated the

law by "possessing" stolen property, such as currency. Upon retrial the jury may be told that the two elements of the offense are possession and knowledge, but not that one may be inferred from the other.

'Our second basis of reversal as to Count 1, having to do with the appellant's Fifth Amendment privilege against compelled self-incrimination, is clearly related to the first basis just explicated. Our Dyer Act and other decisions approving the use of the "unexplained possession" instruction have implicitly recognized the tension between the language of the instruction and the accused's privilege not to testify at his own trial. We have resolved this tension by emphasizing the difficulty in proving the essential element of "knowledge" in most cases involving stolen goods and by pointing out that possession of recently stolen property was susceptible of explanation by means other than the trial testimony of the defendant. The delivery of the "unexplained possession" instruction in this case, however, went too far towards circumscribing the appellant's constitutionally protected privilege to remain silent during his trial. The appellant having been charged with the offense of possession, it is altogether possible that when the jury heard the "unexplained possession" charge, it concluded that the appellant was under a legal obligation to come forward with an explanation of his possession of the checks and that this obligation could be satisfied only through the trial testimony of the appellant. We conclude that the "unexplained possession" instruction, in the context of this case, substantially prejudiced the appellant's rights and accordingly we set aside the judgment of conviction under the indictment and remand that accusation to the district court for a new trial.' "

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-5443

JAMES EDWARD BARNES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINIONS BELOW

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III.

WAS THE EVIDENCE SUFFICIENT TO SHOW THAT THE DEFENDANT HAD FORGED OR UTTERED THE CHECKS?

The evidence was insufficient to show that the defendant forged the two checks mentioned in the Indictment, in that the defendant did not take the witness stand in his own behalf and deny it, and there is only circumstantial evidence—and that is, his depositing them—against him that he forged these checks. This certainly is not any sort of proof. Further the defendant was denied equal protection by the failure of the government to supply him with an independent handwriting expert.

IV.

DOES THE CONVICTION OF FORGERY AND UTTERING CONSTITUTE DOUBLE PUNISHMENT FOR THE SAME OFFENSE?

It would appear that the punishment of the defendant for the crimes of forgery and uttering, which appear to arise out of the same double punishment and would violate the Eighth Amendment to the Constitution of the United States and would be cruel and inhuman punishment. The said *Eighth Amendment* states:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and inhuman punishment inflicted."

In the case of *Trop v. Dulles*, 356 U.S. 86, 100, the court held that *banishment* was "cruel and inhuman", stating, "while the State has the power to punish, the Amendment stands to assure that this right be exercised

within the limits of civilized standards." Although Congress is awarded the greatest discretion possible in a case of penal action . . . the final judgment as to whether the punishment exceeds Constitutional limits is a judicial matter.

See also *Weems v. United States,* 317 U.S. 349-379.

Therefore, it would appear under the facts and the aforementioned cases that the conviction of "uttering" constitutes a double punishment if we also convict the defendant of forgery. Therefore we should reverse the conviction of uttering, and we request that the conviction of uttering be reversed.

CONCLUSION

The judgment of the Court of Appeals should be reversed for either or all of the foregoing reasons.

Respectfully submitted,

MALCOLM H. MACKEY
Counsel for Petitioner

III.

WAS THE EVIDENCE SUFFICIENT TO SHOW THAT THE DEFENDANT HAD FORGED OR UTTERED THE CHECKS?

The evidence was insufficient to show that the defendant forged the two checks mentioned in the Indictment, in that the defendant did not take the witness stand in his own behalf and deny it, and there is only circumstantial evidence—and that is, his depositing them—against him that he forged these checks. This certainly is not any sort of proof. Further the defendant was denied equal protection by the failure of the government to supply him with an independent handwriting expert.

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Therefore, it would appear under the facts and the aforementioned cases that the conviction of "uttering" constitutes a double punishment if we also convict the defendant of forgery. Therefore we should reverse the conviction of uttering, and we request that the conviction of uttering be reversed.

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Respectfully submitted,

MALCOLM H. MACKEY
Counsel for Petitioner

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Constitution, statutes and rule:

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5443

JAMES EDWARD BARNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (App. 19–21) is reported at 466 F. 2d 1361.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1972. The petition for a writ of certiorari was filed on September 21, 1972, and was granted on December 4, 1972 (App. 22). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

497-358—73——2

QUESTIONS PRESENTED

1. Whether a jury may properly be instructed that possession of recently stolen goods, if not satisfactorily explained, is a circumstance from which it may, but is not required to, infer that the possessor knew the property was stolen.

2. Whether, in a prosecution under 18 U.S.C. 1708 for possessing Treasury checks stolen from the mail, guilt may be established by proving that the accused knew the Treasury checks he possessed were stolen, without also proving that he knew they were stolen from the mail.

3. Whether, in a prosecution under 18 U.S.C. 495, one may properly be convicted and sentenced to concurrent prison terms on separate counts of forging an endorsement on a Treasury check and uttering the same check.

STATUTES INVOLVED

1. 18 U.S.C. 1708 provides:

> Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, pack-

age, bag, or mail, or any article or thing contained therein; or

Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

2. 18 U.S.C. 495 provides:

Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any

account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited—

Shall be fined not more than $1,000 or imprisoned not more than ten years, or both.

STATEMENT

Petitioner was charged in an eight count indictment (App. 2–4), returned in the United States District Court for the Central District of California, with various offenses arising out of the theft of four Treasury checks from the mail. The first four counts, charging violations of 18 U.S.C. 1708, alleged that petitioner had in his possession the contents of letters which had been addressed to Nettie Lewis, Albert Young, Arthur Salazar, and Mary Hernandez, and which had been stolen from the mail. Counts five through eight, charging violations of 18 U.S.C. 495, alleged that petitioner forged the endorsements of payees Nettie Lewis and Mary Hernandez on Treasury checks and that he uttered those checks knowing the endorsements to be forged.

After a jury trial, petitioner was convicted on the six counts relating to Nettie Lewis and Mary Hernandez and was acquitted on the two counts charging possession of stolen mail relating to Albert Young and Arthur Salazar (App. 18). He was sentenced to concurrent three year terms of imprisonment on each count.

1. The evidence at the trial showed that on June 2, 1971, petitioner, falsely identifying himself as "Clarence Smith," opened a checking account in that name

at an Inglewood, California, branch of the Crocker National Bank (App. 9–10). On or about July 1 and July 3, 1971, the United States Disbursing Office at San Francisco issued and mailed four United States Treasury checks, in the amounts of $269.02, $154.70, $184.00, and $268.80, to Nettie Lewis, Albert Young, Arthur Salazar, and Mary Hernandez (App. 5–6; Tr. 16).[1] On July 8, 1971, at a different branch of the Crocker National Bank, petitioner deposited these four checks into the "Smith" account. Each check carried the apparent endorsement of the payee and a second endorsement by "Clarence Smith" (App. 10–11).

The payees of the four checks each testified that he or she (1) had expected but had never received the check, (2) had not authorized petitioner to receive his or her mail or to negotiate the check, and (3) had not made the endorsement on the check deposited by petitioner (App. 6–9; Tr. 21–26).

A government handwriting expert testified that he concluded, after comparing the purported signatures of the four payees and of Clarence Smith on the checks with handwriting exemplars obtained from petitioner, that the signatures of Nettie Lewis and Mary Hernandez, as well as the four Clarence Smith signatures, were made by petitioner (App. 14).[2]

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[1] These facts were the subject of a stipulation. The appendix contains only that portion of the stipulation relating to the Lewis and Hernandez checks.

[2] The witness's findings with respect to the Young and Salazar signatures were inconclusive. Although he found "a number of similarities" between petitioner's handwriting and

Petitioner did not testify at trial, but a postal inspector who interviewed him after his arrest related certain statements petitioner made during the interview.[3] Petitioner told the inspector that he had opened the Clarence Smith account in Inglewood on or about June 1, 1971,[4] that he had been in the furniture business and had received the checks in question from "dudes and chicks" who sold furniture for him door-to-door, and that the checks had been signed in the payees' names when he received them. Petitioner said he could not name or identify any of the salespeople, and could not substantiate the existence of any furniture orders because the salespeople wrote their orders on scratch paper that was not retained. Petitioner admitted that he made the Clarence Smith endorse-

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the purported signatures of Young and Salazar, in each case he "did not feel that in the aggregate these similarities were sufficient for me to make an absolute conclusive statement concerning [petitioner's] authorship of it" (Tr. 76–77). The indictment did not charge petitioner with forging and uttering the Young and Salazar checks.

[3] Petitioner had first been advised of his constitutional rights, had stated his willingness to waive those rights and discuss the case with the inspector, and had signed a waiver-of-rights form (Tr. 44–46; App. 11–12).

[4] At a brief hearing out of the jury's presence, the inspector testified that petitioner said he had used an alias because he was then on parole and thought it might cause trouble to use his real name (Tr. 46, 47–48). The district court, after ascertaining that the government would not seek to impeach petitioner with prior convictions if he chose to testify, ordered that no reference was to be made in the jury's presence to petitioner's statement that he had been on parole (Tr. 48).

ments and deposited the checks, but he denied signing the payees' endorsements. (App. 12; Tr. 55.)[5]

2. The district court instructed the jury that "[t]hree essential elements are required to be proved" to establish guilt under 18 U.S.C. 1708: that the accused unlawfully had in his possession the contents of a letter, that the contents were stolen from the mail, and that the accused "knew the contents had been stolen" (App. 15–16). Over petitioner's objection (Tr. 123–124), the court instructed that "[p]ossession of recently stolen property, if not satisfactorily explained," was a circumstance from which the jury might, but need not, "draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case," that the possessor knew the property had been stolen. The court emphasized that the jury was "never required to make this inference," that possession may be satisfactorily explained through evidence other than the testimony of the accused, and that the accused need not testify.[6]

[5] Defense counsel, in argument to the jury, characterized the statements made to the inspector as petitioner's "side of the story" (Tr. 107), and suggested that petitioner found it unnecessary to take the stand because "all the facts came out" through the inspector's testimony (Tr. 107–108).

[6] The full instruction on the inference from unexplained possession is as follows (App. 16; Tr. 123–124):

"Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

"However, you are never required to make this inference. It is

The court also instructed the jury that it was "permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in the light of experience" (Tr. 117), that "the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged" (Tr. 126, 127), that "[t]he law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence" (Tr. 120, 126, 127), and

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the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property.

"The term 'recently' is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

"If you should find beyond a reasonable doubt from the evidence in the case that the mail described in the indictment was stolen, and that while recently stolen the contents of said mail here, the four United States Treasury checks, were in the possession of the defendant you would ordinarily be justified in drawing from those facts the inference that the contents were possessed by the accused with knowledge that it was stolen property, unless such possession is explained by facts and circumstances in this case which are in some way consistent with the defendant's innocence.

"In considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of constitutional rights the accused need not take the witness stand and testify.

"Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the accused."

that "no presumption of guilt may be raised, and no inference of any kind may be given, from the failure of a defendant to testify" (Tr. 120).

3. The court of appeals affirmed petitioner's conviction on the six counts relating to the Nettie Lewis and Mary Hernandez checks (App. 19–21). It held that the evidence, viewed in the light most favorable to the government, "is more than adequate to sustain" the convictions for possessing stolen mail (App. 19), and it stated that "we cannot here hold that permitting the jury to infer knowledge from [petitioner's] possession was impermissible because of any 'lack of a rational connection between [them] in common experience'" (App. 21). Because petitioner received identical concurrent sentences on all six counts, the court declined to consider his challenges to the convictions on the forgery and uttering counts (App. 21).

SUMMARY OF ARGUMENT

I

A. This Court's decisions relating to the validity of "statutory presumptions" provide the standard for determining whether the instructions in this case were consistent with due process. The inference of knowledge from unexplained possession of recently stolen property is proper if it can "be said with substantial assurance that the presumed fact [knowledge] is more likely than not to flow from the proved fact [unexplained possession] on which it is made to depend" (*Leary* v. *United States*, 395 U.S. 6, 36).

B. The district court correctly instructed the jury that it could, although it was not required to, infer from the petitioner's unexplained possession of recently stolen property that he knew the property was stolen. The inference is deeply rooted in the common law, has been almost universally recognized in this country from the beginning, and accords with human experience. This Court on several occasions has recognized and approved the inference of knowledge or theft from one's unexplained possession of stolen goods, and instructions on such inferences have long been approved by the lower federal courts.

The evidence as a whole—including petitioner's possession of the checks shortly after they were mailed, his forgery of the payees' signatures, his use of an alias, his false denial to the postal inspector that he signed the payees' names, and his implausible tale about unsubstantiated furniture sales—justified the jury in concluding beyond a reasonable doubt that he knew the checks were stolen. The district court properly charged the jury that it could find knowledge only on the basis of all the evidence, including the permissible inference.

Moreover, under this Court's decisions in *Leary, supra,* and *Turner* v. *United States,* 396 U.S. 398, the inference here would be sustained even if the test were whether knowledge flows beyond a reasonable doubt from unexplained possession. One who possesses recently stolen Treasury checks payable to strangers and

is unable to explain the circumstances satisfactorily must be aware of the high probability that those checks were stolen.

The fact that both possession and knowledge are elements of the offense here does not preclude the drawing of an inference of the latter from the former.

C. The instruction on the inference did not impermissibly interfere with petitioner's decision not to testify. Any pressure upon him to take the stand resulted not from the court's instructions—which specified that possession could be explained by evidence other than the accused's testimony and that the accused need not take the stand—but from the strength of the government's case against him.

Nor were the instructions an adverse comment on his decision not to testify. The court charged the jury that the defendant need not testify and that no inference could be drawn from his failure to do so; it also instructed that the defendant's possession could be explained by "other circumstances, other evidence, independent of the testimony of the accused."

D. Even if the instruction on the inference from unexplained possession was improperly given, the error, in the circumstances of this case, was harmless. The jury found petitioner guilty of forging the checks, and this alone implies that he knew they were stolen. Moreover, the verdict acquitting petitioner of possessing two other checks indicates that the jury relied not upon the inference, which was available as to all four checks, but upon the testimony of the handwriting

expert, who found that petitioner had signed the payees' names on the two checks that he was found guilty of possessing.

II

Under 18 U.S.C. 1708, which makes it a crime to possess any article stolen from the mail "knowing [it] * * * to have been stolen," it is unnecessary for the government to prove that the accused knew the article had been stolen from the mail. This unambiguous meaning of the statutory language is confirmed by its legislative history, which shows that Congress intentionally eliminated the requirement in an earlier version of the statute that the defendant know that the theft had been from the mail.

III

Petitioner argues that his conviction and sentencing on the separate counts of forging and uttering the checks was impermissible "double punishment." Since petitioner received identical concurrent sentences on all four counts of forgery and uttering and both counts of possession, there is no occasion for this Court to consider the contention. In any event, 18 U.S.C. 495 makes forgery and uttering separate crimes, involving different elements. One can forge a check without uttering it, or utter it without having forged it. There is nothing unreasonable about punishing those separate crimes separately.

ARGUMENT

I

THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY THAT IT COULD INFER FROM PETITIONER'S UNEXPLAINED POSSESSION OF RECENTLY STOLEN PROPERTY THAT HE KNEW THE PROPERTY WAS STOLEN

The principal issue in this case is whether the Fifth Amendment's due process clause or petitioner's privilege against self-incrimination were violated by the district court's instruction that unexplained possession of recently stolen property is a circumstance from which the jury may infer that the possessor knew the property was stolen.[7] The court charged that the jury was not required to draw the inference, but merely could do so; and that, in deciding whether the defendant knew that the property he possessed was stolen, the jury should consider not only the inference but also "the surrounding circumstances shown by the evidence in the case" (Tr. 123). This case, therefore, involves no issue

[7] Petitioner asserts (Br. 7, 8, 14, 17), without elaboration or explanation, that his Sixth Amendment rights are also implicated. In our view, there is nothing in the Sixth Amendment that, under the decisions of this Court, arguably precludes the instruction given in this case, and we do not understand the basis of petitioner's assertion. Mr. Justice Black's view that "statutory presumptions" violate the Sixth Amendment right to trial by jury was implicitly rejected by the Court in *United States* v. *Gainey*, 380 U.S. 63, 76–81 (dissenting opinion), and even he saw no constitutional problem with judicially-created inferences. See *Bollenbach* v. *United States*, 326 U.S. 607, 616–618 (dissenting opinion). In any event, if, as we show below, the instruction was consistent with due process and did not abridge petitioner's Fifth Amendment privilege, we do not believe it could impermissibly affect any Sixth Amendment interest.

of the reasonableness of a statutory presumption, but only the propriety of the particular inference the jury was authorized to make in weighing the circumstantial evidence in this case.

A. A JURY MAY BE AUTHORIZED TO INFER FROM PROVED FACTS ANOTHER FACT WHICH IS ESSENTIAL TO GUILT IF IN REASON AND EXPERIENCE THE INFERRED FACT IS MORE LIKELY THAN NOT TO FLOW FROM THE PROVED FACT

The standards by which to determine the constitutionality of jury instructions concerning permissible inferences are provided by this Court's decisions on the validity of "statutory presumptions." The basic question in both contexts is the same: whether the instructions had the effect of permitting the jury to convict the defendant on insufficient evidence. See *United States* v. *Romano,* 382 U.S. 136, 141–144; *Leary* v. *United States,* 395 U.S. 6, 37 (issue is whether the statute "permits conviction upon insufficient proof" of an element of the offense); *Turner* v. *United States,* 396 U.S. 398, 407 ("the question on review is the sufficiency of the evidence"); *Dunlop* v. *United States,* 165 U.S. 486, 502 (non-statutory inference from unexplained possession of recently stolen property "is sufficient to authorize the jury to convict"). The constitutional standards for evaluating inferences authorized by statute are therefore no different than those for assessing judicially-created inferences. *United States* v. *Johnson,* 433 F. 2d 1160, 1168, n. 55 (C.A. D.C.).[8]

[8] This Court has stated that, in applying the standards to a specific inference, particularly "in matters not within specialized judicial competence or completely commonplace" or

The constitutional test for jury instructions on permissible inferences was announced in *Tot* v. *United States*, 319 U.S. 463. At issue there was the validity of a provision of the Federal Firearms Act that permitted a jury to infer from the accused's possession of a firearm both that he had received it in interstate or foreign commerce and that he had received it after the effective date of the statute. The Court, recognizing (*id.* at 467) that "[t]he jury is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference," nonetheless held the statutory provision unconstitutional because it failed to meet the following standards (*id.* at 467–468):

> [A] statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances

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where the courts have differed over the permissibility of the inference, "significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." *United States* v. *Gainey*, 380 U.S. 63, 67. See, also, *Leary* v. *United States*, 395 U.S. 6, 36. We show below that the inference from possession of recently stolen property is one that has historically been viewed as "within specialized judicial competence" and as "completely commonplace." That it is not embodied in a statutory provision is therefore of no importance in the context of this case.

> of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts.

This test of "rational connection * * * in common experience" was reaffirmed in *United States* v. *Gainey*, 380 U.S. 63, 66–67, and *United States* v. *Romano*, 382 U.S. 136, 139, where the Court considered statutory provisions authorizing a jury to infer from the accused's unexplained presence at an illegal still that he was unlawfully carrying on the business of a distiller and that he was in possession and control of the still. Thereafter, in *Leary* v. *United States*, 395 U.S. 6, the Court stated (*id.* at 36):

> The upshot of *Tot*, *Gainey*, and *Romano* is, we think, that a criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. * * *

The Court in *Leary* struck down a statute which allowed a jury to infer from the accused's possession of marihuana both that the drug had been illegally imported and that the accused knew it was illegally imported, on the ground that the provision did not satisfy this more-likely-than-not standard. It therefore did not reach the question whether a statutory presumption that satisfies the more-likely-than-not standard "must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use" (395 U.S. at

36, n. 64). The issue was left unresolved again in *Turner* v. *United States*, 396 U.S. 398, where the Court considered several provisions permitting inferences from possession of narcotic drugs. Those it upheld satisfied both tests (see 396 U.S. at 416), while those it struck down did not meet even the more-likely-than-not standard (see *id.* at 419).

As in *Leary* and *Turner*, the Court need not resolve the issue here for, as we show below, the inference on which the district court instructed the jury in this case satisfies any formulation of the applicable test. We submit, however, that if the Court reaches the issue, the proper test is the more-likely-than-not standard stated by the Court in *Leary*, and not a requirement that the proven fact must establish the inferred fact beyond a reasonable doubt.

The jury is permitted to draw inferences because they accord with common experience concerning conclusions that reasonable men may and normally do draw from established facts. They are a technique of judicial administration designed to avoid the introduction of evidence which is ordinarily difficult to produce and which in any event is unnecessary because even without the evidence the jury normally would draw the inference. A defendant is protected against being convicted without sufficient evidence by the instruction that every element of the offense must be proved beyond a reasonable doubt.

One element of the crime of which petitioner was convicted was that he knew that the checks were stolen. The court charged the jury that it must so find,

and that in considering that finding it was to consider both the inference and all other evidence. The drawing of the inference of petitioner's knowledge from his possession of the recently stolen checks is merely one element of the proof.

In determining the factual issues in any case, the jury necessarily draws a large number of inferences. Here, for example, there was no direct evidence that the checks had been stolen from the mail. The jury inferred that fact from the circumstantial evidence that the checks were mailed but were never received by the addressees. The inference was permissible because in reason and experience the most likely explanation of the circumstances was that the checks were stolen while in the custody of the postal system. There is no reason to apply to the inference that one who possesses recently stolen property knows it is stolen the requirement that the conclusion must follow from the premise beyond a reasonable doubt. The reasonable-doubt standard governs the proof of all elements of the crime, but not the validity of the inferences the jury draws in determining those elements.

Rule 303 of the proposed Federal Rules of Evidence is in accord with the view that the reasonable-doubt inquiry should relate to the evidence as a whole rather than to the inference standing alone. It provides that the judge "may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror *on the evidence as a whole, including the evidence of the basic facts,* could find guilt or the presumed fact beyond a reasonable doubt" (Rule 303(b); emphasis added). Similarly, the rule

directs the judge to instruct the jury that, where the "presumed fact" is an element of the offense, "its existence must, *on all the evidence*, be proved beyond a reasonable doubt" (Rule 303(c); emphasis added).[9]

B. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY ON THE INFERENCE IT COULD DRAW FROM PETITIONER'S UNEXPLAINED POSSESSION OF RECENTLY STOLEN PROPERTY

1. The inference from possession of recently stolen property that the possessor knows the property is stolen is deeply rooted in the common law and is almost universally recognized as reflecting common human experience

Inferences are accepted by courts as reasonable when, over the course of human experience, it is perceived that one fact ordinarily follows from another. Thayer, in his *Preliminary Treatise on Evidence*

[9] The Rule provides in full:

"(a) *Scope.*—Except as otherwise provided by Act of Congress, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt, are governed by this rule.

"(b) *Submission to jury.*—The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

"(c) *Instructing the jury.*—Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the

(1898), described the process by which presumptions or inferences are created (p. 326):

> Many facts and groups of facts often recur, and when a body of men with a continuous tradition has carried on for some length of time this process of reasoning upon facts that often repeat themselves, they cut short the process and lay down a rule. To such facts they affix, by a general declaration, the character and operation which common experience has assigned to them. * * *

For centuries, the courts have recognized several reasonable inferences that may be drawn from a person's unexplained possession of recently stolen property: (a) that he knew the property was stolen,[10] (b) that he not only knew the property was stolen but was himself the thief,[11] and (c) that he was not only the thief but also the perpetrator of any other crime that may have been committed together with the theft.[12] The inference at issue here is the first of these. If either of the others is reasonable, then the inference of knowledge is *a fortiori* reasonable, because the others necessarily presuppose knowledge that the property was stolen.

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presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt."

[10] See Christie and Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 Duke L.J. 919, 925-926.

[11] See 9 Wigmore, *Evidence* § 2513 (3d. ed. 1940); *United States* v. *Johnson*, 433 F. 2d 1160, 1169 (C.A.D.C.)

[12] See *Wilson* v. *United States*, 162 U.S. 613.

The historical development of these inferences was traced by Thayer, who, in illustrating "rules of presumption" "running through a dozen centuries," adverted to the inference from unexplained possession (*Treatise, supra,* at 328):

> To be found thus in the possession of stolen goods was a serious thing; if they were recently stolen, then was one "taken with the mainour,"—a state of things that formerly might involve immediate punishment, without a trial; and, later, a trial without a formal accusation; and, later still, a presumption of guilt which, in the absence of contrary evidence, justified a verdict, and at the present time is vanishing away into the mere judicial recognition of a permissible inference,—as it is stated in Stephen's "Digest of Criminal Law:" "The inference that an accused person has stolen property or has received it, knowing it to be stolen, may be drawn from the fact that it is found in his possession after being stolen, and that he gives no satisfactory account of the way in which it came into his possession." * * *

Thayer added in a footnote (*ibid.,* n. 5): "Probably the reason of the existence and persistence of the 'presumption' * * * is found in what I have intimated in the text, namely, the long historical root that the thing has. It is found in all systems of law." [13]

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[13] See, also, 2 East, *Pleas of the Crown,* p. 656 (1803):

"It may be laid down generally, that wherever the property of one man, which has been taken from him without his knowledge or consent, is found upon another, it is incumbent on that other to prove how he came by it; otherwise the presumption

The validity of inferences from unexplained possession was upheld in a number of early American cases. See, *e.g., Commonwealth* v. *Millard,* 1 Mass. 6 (1804); *State* v. *Smith,* 24 N.C. 402 (1842); *Knickerbocker* v. *People,* 43 N.Y. 177 (1870); *State* v. *Raymond,* 46 Conn. 345 (1878); *Cook* v. *State,* 84 Tenn. 461 (1886). See, also, the detailed annotation in 101 Am. St. Rep. 481–524 (1904).

This Court, as early as 1896, upheld an instruction permitting a jury to infer the defendant's guilt of murder from his unexplained possession of the dead man's effects. *Wilson* v. *United States,* 162 U.S. 613. Wilson had been camping with the victim at about the time the murder was committed. When he was arrested two weeks later, he had possession of horses, a wagon, a gun, and a certificate of deposit belonging to the victim, as well as all the dead man's clothing. The government presented other highly incriminating evidence as well. The defendant testified in his own behalf, but, as this Court stated (*id.* at 615), "[h]is explanations of the appearances against him, on the stand and otherwise, were inadequate and improbable, and evidence in much detail showed that many of his statements were false." The trial judge instructed the jury that, if the accused was in possession of the dead man's property, and if that posses-

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is that he obtained it feloniously. This, like every other presumption, is strengthened, weakened, or rebutted, by concomitant circumstances, too numerous in the nature of the thing to be detailed. It will be sufficient to allude to some of the most prominent; such as, the length of time which has elapsed between the loss of the property and the finding it again * * *."

sion was not accounted for in a satisfactory way, then it may be "the foundation for a presumption of guilt" of the offense of murder (*id.* at 617). Rejecting Wilson's challenge to that instruction, this Court held (*id.* at 619, 620):

> Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence. * * * Proof that defendant had in his possession, soon after, articles apparently taken from the deceased at the time of his death is always admissible, and the fact, with the legitimate inference, is to be considered by the jury along with the other facts in the case in arriving at their verdict. * * *

In *Dunlop* v. *United States,* 165 U.S. 486, the Court referred to the traditional inference that the possessor of recently stolen property is the thief. The defendant there had sought an instruction that the presumption of innocence overrides all other presumptions. This Court responded that, if such a rule were adopted, convictions upon circumstantial evidence would be impossible, "since the gist of such evidence is that certain facts may be inferred or presumed from proof of other facts" (*id.* at 502). The Court stated (*ibid.*):

> Thus, if property recently stolen be found in the possession of a certain person, it may be

> presumed that he stole it, and such presumption is sufficient to authorize the jury to convict, notwithstanding the presumption of his innocence. * * *

This inference was recognized and approved by this Court in at least two other cases. In *McNamara* v. *Henkel,* 226 U.S. 520, the appellant challenged the determination of a United States Commissioner that there was probable cause to conclude that he committed the offense of burglary in British Columbia and therefore could be extradited. The evidence showed that an automobile had been stolen from a building between 4:00 and 6:00 a.m., and that appellant was seen trying to start the stolen car at about 6:00 a.m. some 40 feet from the building. This Court, citing *Wilson,* agreed with the district court that "this was evidence connecting the appellant with the crime * * *" (*id.* at 524). Appellant argued, however, that even if his possession of the stolen automobile permitted an inference that he participated in the larceny, it did not permit an inference that he committed the burglary. The Court held (*id.* at 525):

> The permissible inference is not thus to be limited. The evidence pointed to the appellant as one having control of the car and engaged in the endeavor to secure the fruits of the burglarious entry. Possession in these circumstances tended to show guilty participation in the burglary. This is but to accord to the evidence, if unexplained, its natural probative force. * * *

Finally, in *Rugendorf* v. *United States,* 376 U.S. 528, the defendant was convicted of receiving stolen

fur pieces which had been transported in interstate commerce, knowing them to have been stolen. It was stipulated that some of the furs had been stolen on February 10; these were found on March 22 in the basement of the defendant's home, in a closet opening off a regularly used recreation room and in which a fur belonging to the defendant's wife was also hanging. The defense was that the furs were placed there without the defendant's knowledge while he and his wife were vacationing elsewhere. He argued in this Court that the evidence was insufficient to convict him. The Court, quoting with approval the unexplained-possession rule stated in *Wilson,* held that "a prima facie case was made out by the stipulation and the presence of furs in petitioner's home" (*id.* at 537).

In view of the historic recognition of the unexplained-possession rule and its repeated approval by this Court, it has not surprisingly been referred to as "[o]ne of the few almost universally recognized presumptions * * *."[14] Model instructions authorizing a jury to infer knowledge of theft and interstate transportation, or knowledge of theft and guilt of theft, from the accused's unexplained possession of recently stolen property are included in a leading form book of federal jury instructions,[15] and similar instructions are regularly approved by the courts of appeals.[16]

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[14] Christie and Pye, *supra*, note 10, 1970 Duke L. J. at 925. See also, *United States* v. *Jones*, 418 F. 2d 818, 821 (C.A. 8).

[15] 1 Devitt and Blackmar, *Federal Jury Practice and Instructions*, §§ 13.10, 13.11 (2d ed. 1970).

[16] Among the many recent cases involving instructions similar to those given here are the following: *United States* v. *Karger*, 439 F. 2d 1108 (C.A. 1) (pledging as collateral stolen securi-

The proposed Federal Rules of Evidence would recognize the unexplained-possession rule.[17]

Mr. Justice Black stated, in his dissent in *Bollenbach* v. *United States*, 326 U.S. 607, 616–617, that the inference from unexplained possession has been accepted "since time immemorial" and that "[t]he experience of ages has justly given this particular type of circumstantial evidence a high value." This long

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ties, knowing them to be stolen); *United States* v. *Izzi*, 427 F. 2d 293 (C.A. 2) (interstate transportation of stolen securities); *United States* v. *Russo*, 413 F. 2d 432 (C.A. 2) (interstate transportation of stolen goods); *United States* v. *Coppola*, 424 F. 2d 991 (C.A. 2), certiorari denied *sub. nom. Connelly* v. *United States*, 400 U.S. 827 (interstate transportation of stolen securities); *United States* v. *Smith*, 446 F. 2d 200 (C.A.) (possession of stolen mail); *United States* v. *Ross*, 424 F. 2d 1016 (C.A. 4), certiorari denied, 400 U.S. 819 (concealing goods stolen from interstate commerce); *United States* v. *Winbush*, 428 F. 2d 357 (C.A. 6), certiorari denied, 400 U.S. 918 (possession of stolen mail); *United States* v. *Wolfenbarger*, 426 F. 2d 992 (C.A. 6) (receiving a stolen car moving in interstate commerce); *United States* v. *Hood*, 422 F. 2d 737 (C.A. 7), certiorari denied, 400 U.S. 820 (receipt and concealment of stolen automobiles); *United States* v. *Dilella*, 354 F. 2d 584 (C.A. 7) (possession of goods stolen from interstate commerce); *United States* v. *Liggins*, 451 F. 2d 577 (C.A. 8) (possession of stolen mail); *Foston* v. *United States*, 389 F. 2d 86 (C.A. 8), certiorari denied, 392 U.S. 940 (possession of stolen mail); *United States* v. *Marquez*, 462 F. 2d 620 (C.A. 9) (possession of goods stolen from a foreign shipment); *United States* v. *Garrett*, 457 F. 2d 1311 (C.A. 9) (possession of stolen mail); *Cotton* v. *United States*, 409 F. 2d 1049 (C.A. 10) (possession of stolen mail); *United States* v. *Baker*, 444 F. 2d 1290 (C.A. 10), certiorari denied, 404 U.S. 885 (possession of stolen mail); *Pendergrast* v. *United States*, 416 F. 2d 776 (C.A.D.C.) (robbery).

[17] Rule 303(a), quoted in note 9, *supra*, would carry forward "in criminal cases, presumptions against an accused, recognized at common law * * *."

history of judicial acceptance is strong evidence of the rational connection in common human experience between unexplained possession of recently stolen property and guilty knowledge, and it strongly supports the constitutionality of an instruction permitting the jury to infer the latter fact from the former.[18]

2. The inference permitted here satisfies both the more-likely-than-not and the reasonable-doubt standards.

a. The instruction in this case authorized the jury to infer from petitioner's unexplained possession of the recently stolen Treasury checks that he knew the checks were stolen. We think it is clear that there is a "rational connection" between the proved fact and the inferable fact and that the latter more likely than not flows from the former. This much at least is suggested by the historical roots of the inference and its universal acceptance by the courts, including this Court.

The judgment that guilty knowledge probably flows from unexplained possession requires neither empirical data nor an appreciation of probability theory. It is a commonplace observation, with which few adults would quarrel, that one who possesses property that

[18] Cf. *In re Winship*, 397 U.S. 358, 361–362:

"Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does 'reflect a profound judgment about the way in which law should be enforced and justice administered.'"

was recently stolen and who is unable to give a satisfactory explanation of his possession probably knows the property was stolen, either because he is himself the thief, or because he participated indirectly in the theft, or because he received the property under circumstances that would reasonably indicate it had been stolen.

It is uncommon, though not unheard of, for an innocent person to find himself in possession of stolen goods. On a rare occasion, one might purchase a wristwatch from a pawnbroker, for example, and discover later that it had been stolen in a robbery before it was pawned. But in those unusual circumstances there is a plainly adequate explanation for the possession. It would be far more extraordinary for an innocent person to have possession of stolen goods and to be *unable* to explain his possession. Though one can perhaps imagine a situation in which unexplained possession is consistent with a lack of knowledge that the goods are stolen, it is fair to say that in the overwhelming majority of cases the natural assumption would be that the possessor has guilty knowledge. The inference here thus satisfies the more-likely-than-not test.

The decisions in which this Court held statutory inferences arbitrary or irrational all involved inferences that depended upon highly empirical assumptions that were not supported by the available data or that did not square with human experience. In *Tot* for example, the defective statute authorized a jury to infer from possession of a firearm both that the

firearm was received in interstate commerce and that it was received after the Act's effective date. These facts, however, were not rationally connected, because there was insufficient basis for concluding from possession that a particular firearm was received by the accused in interstate commerce, and even less basis for concluding that it was received after a particular date. "[T]he presumptions created by the law are violent, and inconsistent with any argument drawn from experience" (319 U.S. at 468). By contrast, there is nothing violent about the inference here; the experience of generations teaches that one who possesses recently stolen property and who is unable to explain that possession ordinarily knows the property is stolen and, indeed, ordinarily participated in the theft.

In *Romano,* the inference from presence at a still to possession and control of the still did not comport with experience. "Presence tells us only that the defendant was there and very likely played a part in the illicit scheme. But presence tells us nothing about what the defendant's specific function was and carries no legitimate, rational or reasonable inference that he was engaged in one of the specialized functions connected with possession, rather than in one of the supply, delivery or operational activities having nothing to do with possession" (382 U.S. at 141). Here, as we have shown, unexplained possession has historically implied knowledge and does bear a reasonable relation to knowledge.

In *Leary* the Court was dealing with " 'highly empirical' " "data regarding the beliefs of marihuana

users generally about the source of the drug they consume," which were "'not within specialized judicial competence or completely commonplace'" (395 U.S. at 38). Though it concluded that "most domestically consumed marihuana comes from abroad" (*id.* at 44), it held that the available evidence does not support the assertion that one possessing marihuana is more likely than not to know it was illegally imported. "[I]t would be no more than speculation were we to say that even as much as a majority of possessors 'knew' the source of their marihuana" (*id.* at 53).

The Court's rejection in *Turner* of the statutory inferences from possession of cocaine was, as in *Leary*, grounded in an analysis of empirical data concerning the source of the drug and the chance that one possessing it would know it was illegally imported.

b. That the inference from unexplained possession satisfies the more-likely-than-not standard is, in our view, enough to sustain the validity of the inference. The only further inquiries in this case should be whether a reasonable juror could have found on all the evidence that petitioner knew the checks were stolen, and whether the district court's instructions properly placed the inference before the jury. The answer to both questions is yes.

The evidence showed that petitioner was in possession of the Lewis and Hernandez checks within several days of their theft. That he forged the payees' signatures on these checks. That he deposited the checks in a bank account [illegible] under a fals-

name, and that he falsely told the postal inspector the checks had contained the payees' signatures when he received them. The jury could, moreover, reasonably take into account that one who comes into possession of government checks that have not been endorsed by the payees is likely to know the checks are stolen. Petitioner's explanation, as related by the postal inspector, was wholly unsubstantiated and implausible, and the jury could properly have discredited it entirely as an explanation of petitioner's possession while considering also whether he would have invented such a tale if in fact his possession of the checks had been innocent. On this evidence the jury properly concluded that petitioner knew the checks had been stolen.

The district court correctly instructed the jury that possession of recently stolen property was a circumstance from which they *might* infer knowledge, while emphasizing that they were not *required* to draw that inference. The court also instructed that the prosecution was required to prove each element of the offense beyond a reasonable doubt and that the jury's findings as to knowledge should be made "in the light of the surrounding circumstances shown by the evidence in the case" (see note 6, *supra*). These instructions thus properly explained the function of the inference and indicated its relationship to the ultimate standard of proof beyond a reasonable doubt.

c. Even if the reasonable-doubt standard is applied to the unexplained-possession inference rather than the evidence as a whole—that is, even if the instruc-

tion here may be sustained only if it can be said that beyond a reasonable doubt the inferable fact (knowledge) flows from the proved fact (unexplained possession)—the inference was permissible. The considerations that led this Court to approve the statutory inferences in *Turner* and *Gainey* apply, we think, with even greater force to the unexplained-possession rule.

In *Turner*, this Court held that, because one who possesses heroin must be aware of the "high probability" that it was illegally imported, the statutory provision authorizing a jury to infer such knowledge from possession satisfied the reasonable-doubt as well as the more-likely-than-not tests. " 'Common sense' * * * tells us that those who traffic in heroin will inevitably become aware that the product they deal in is smuggled, unless they practice a studied ignorance to which they are not entitled" (396 U.S. at 417). Similarly, common sense tells us, even without the empirical inquiry made in *Turner*, that one who possesses recently stolen Treasury checks payable to persons he does not know, and who does not satisfactorily explain his possession, must be aware of the high probability that the checks have been stolen.

The Court also upheld in *Turner* the statute permitting the jury to infer from the defendant's possession of heroin that he purchased it in or from an unstamped package. Since "it is so extremely unlikely that a package containing heroin would ever be legally stamped," there could "be no reasonable doubt that one who possesses heroin did not obtain

it from a stamped package" (396 U.S. at 421–422). Moreover, there could be no reasonable doubt that the heroin was purchased (*id.* at 422):

> Since heroin is a high-priced product, it would be very unreasonable to assume that any sizable number of possessors have not paid for it, one way or another. Perhaps a few acquire it by gift and some heroin undoubtedly is stolen, but most users may be presumed to purchase what they use. * * *

On the same analysis, it would be "very unreasonable to assume that any sizable number of possessors" of recently stolen Treasury checks, who cannot explain that possession satisfactorily, are not at least aware that the checks are stolen.

Likewise, in *Gainey*, the Court sustained a statute permitting the jury to infer from the accused's presence at a still that he was engaged in the broadly inclusive offense of carrying on the business of a still. Because in the manufacture of illegal liquor "strangers to the illegal business rarely penetrate the curtain of secrecy" (380 U.S. at 67–68), the statute, by permitting an inference of participation from presence, merely accorded to the evidence its natural probative force. Indeed, the Court made clear that even in the absence of the statute an instruction permitting such an inference "would surely have been permissible" (*id.* at 70). Persons in unexplained possession of recently stolen property also "rarely" are without knowledge of its character.

d. The unexplained-possession rule comports with reality in another important respect. Knowledge that

property is stolen can seldom be proved by direct evidence, except where the accused has given inculpatory statements. If the jury were not permitted to draw the reasonable inference that one who cannot explain his recent possession knows the goods are stolen, it would often be impossible successfully to prosecute for illegal possession of stolen property, which currently is a serious and apparently widespread offense. See, *e.g.*, *Aron* v. *United States*, 382 F. 2d 965, 970–971 (C.A. 8). The accused is in a better position to deny knowledge and explain his possession than the government is to show by direct proof that he knew the property was stolen.[19]

c. Inferences such as this are normally drawn whenever circumstantial evidence is the basis for determining guilt or innocence. The inference in this case that one who possesses recently stolen property but fails to explain his possession knows that it is stolen is similar to the inferences juries draw every day. The presence of a defendant's fingerprints upon a particular item warrants the conclusion that the defendant handled it, and a defendant's footprints at a particular place justify the inference that the defendant was there. These latter inferences are basically no different than the inference the jury was permitted to draw in this case; in all of them the jury is permitted to

[19] Although this Court has held that this comparative consideration cannot, standing alone, sustain an otherwise impermissible inference (*Tot*, *supra*, 319 U.S. at 469; *Leary*, *supra*, 395 U.S. at 34, 44–45), it has also stated that the factor is significant where, as here, "the inference is a permissible one" (*Tot*, *supra*, 319 U.S. at 469).

find the inferred fact because rational men would normally so conclude on the basis of common experience.

3. The instruction was not invalid because it allowed the jury to infer one element of the offense from proof of another element

Petitioner argues (Br. 8–9, 21–22) that the court should not have instructed the jury on the unexplained-possession inference in this case because "[i]t permitted the jury to infer the facts of knowledge, one element of the offense, from the fact of possession, the other element of the offense" (Br. 8). But if unexplained possession is a fact from which knowledge may reasonably be inferred, it should make no difference that both the proved fact and the inferable fact are elements of the offense. See *e.g., Adams* v. *New York,* 192 U.S. 585, where this Court upheld a state statute forbidding the knowing possession of policy slips and providing that possession would be "presumptive evidence" of knowledge.

Petitioner relies exclusively on the decision of the Fifth Circuit in *United States* v. *Cameron,* 460 F. 2d 1394 (Br. 18–22). In that case an attorney was charged with the knowing possession of currency recently stolen from a bank, and the evidence showed that he received the currency from the mother of a suspect in the robbery as a retainer for representing her son. The court held that the inference instruction should not have been given because it permitted the government to "pyramid the requisite element 'knowledge' on top of the requisite element

of 'possession' without the necessity of the prosecution's coming forward with a single additional evidentiary fact bearing on the appellant's knowledge of the stolen character of the money" (460 F. 2d at 1399).

The court there distinguished other cases on the ground that the fact upon which the inference was grounded was not itself an element of the offense. That analysis is unsound. The other decisions involved the offenses of transporting, receiving, and selling a stolen automobile. But in order to transport, receive, or sell an automobile, one must possess it. The result under *Cameron* is that knowledge cannot properly be inferred from possession if possession is itself an element of the offense, but may be inferred if possession is only an essential part of an element of the offense. The court cited no support for this strained conclusion, and we know of none. On the contrary, the courts of appeals have regularly upheld the unexplained-possession instruction completely without regard to whether the possession is itself an element of the offense.[20]

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[20] Indeed, the Fifth Circuit has itself approved such instructions with respect to the offense involved here, possession of stolen mail knowing it to have been stolen. See *United States* v. *Cook*, 419 F. 2d 1306; *Smith* v. *United States*, 413 F. 2d 1121. Even in cases decided after *Cameron*, the Fifth Circuit has upheld similar instructions where possession was an element. See *United States* v. *Martinez*, 466 F. 2d 679 (possessing securities stolen from the mail), and *United States* v. *Payne*, 467 F. 2d 828 (possessing property stolen from an interstate shipment of freight), in neither of which did the court mention *Cameron*.

See, also, *United States* v. *Gulledge*, 469 F. 2d 713 (C.A. 5), where the court, while acknowledging the *Cameron* holding,

C. THE INSTRUCTION DID NOT VIOLATE PETITIONER'S PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION

Petitioner argues (Br. 7–8, 17–22) that the instruction violated his Fifth Amendment privilege against self-incrimination. Again relying almost entirely on the Fifth Circuit's *Cameron* decision, petitioner apparently contends that the instruction impermissibly interfered with his freedom to decide whether to testify and that it amounted to a comment on his failure to do so. Both contentions, however, have been correctly rejected by this Court. An inference instruction that satisfies the due process standards does not violate the accused's privilege against self-incrimination.

1. The instruction did not impermissibly interfere with petitioner's choice of whether to testify

Petitioner's first contention is fully answered by *Yee Hem* v. *United States*, 268 U.S. 178. The statute there authorized the jury to infer from the accused's unexplained possession of opium that he knew it had been imported illegally, and the Court held that the statutory inference was neither unreasonable nor arbitrary. In response to a Fifth Amendment argument similar to petitioner's here, the Court stated (*id.* at 185):

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sustained an unexplained-possession instruction in a case involving the interstate transportation of stolen property with knowledge that it was stolen. In *United States* v. *Townsend*, C.A. 5, No. 72-2100, decided February 13, 1973, the court again acknowledged *Cameron* but reaffirmed the validity of the "ancient and venerable" inference from unexplained possession, "which would allow us to affirm conviction for theft or for receiving stolen property" (slip op. 8).

> The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The statute compels nothing. It does no more than to make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution.

The Court reaffirmed this view in *Turner*, where it held that, since the inference of knowledge from possession of smuggled heroin is a sound one, the trial court's instructions on that inference "did not place impermissible pressure upon [petitioner] to testify in his own defense" (396 U.S. at 418).[21]

The instructions here, like those in *Turner* (*id.* at

[21] Cf. *Harrison* v. *United States*, 392 U.S. 219, 222 (waiver of privilege by testifying is no less effective because the defendant was motivated "only by reason of the strength of the lawful evidence adduced against him").

406–407), specified that, "[i]n considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of constitutional rights the accused need not take the witness stand and testify" (Tr. 124). In addition, the jury was told that "[p]ossession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the accused" (*ibid.*).

There were "other circumstances" in this case that the jury could consider. Petitioner's statements to the postal inspector that he was given the checks by "dudes and chicks" who sold furniture for him were presented to the jury and relied upon by defense counsel in closing argument (see pp. 6–7, *supra*). Counsel told the jury that petitioner's statements to the inspector constituted his side of the story and that the inspector's testimony made it unnecessary for him to take the stand (note 5, *supra*).

In these circumstances, where petitioner decided not to testify, where the instructions specifically referred to "other circumstances, other evidence" as a source of an explanation for his possession of the checks, and where that other evidence was relied upon by defense counsel in presenting petitioner's defense, the instruction did not interfere with his freedom to decide whether to testify.

2. The instruction was not an adverse comment on petitioner's failure to testify

In *Cameron, supra,* the Fifth Circuit held that the unexplained-possession instruction, where possession

itself was an element of the offense, might have been understood by the jury as a comment on the defendant's failure to testify.[22] That holding, upon which petitioner exclusively relies, overlooks this Court's decision in *Gainey*.

The Court there rejected a similar contention: that the instruction on the inference from unexplained presence at an illegal still was a comment on the accused's failure to take the stand. The Court stated (380 U.S. at 70–71):

> [I]n the context of the instructions as a whole, we do not consider that the single phrase "unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury" can be fairly understood as a comment on the petitioner's failure to testify. * * * The judge's overall reference was carefully directed to the evidence as a whole, with neither allusion nor innuendo based on the defendant's decision not to take the stand. * * *

Not only did the judge here carefully refer to the evidence as a whole, but he also specifically charged the jury, in the context of the inference instruction, that possession could be explained by evidence in-

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[22] The court stated (460 F. 2d at 1400):

"The appellant having been charged with the offense of *possession*, it is altogether possible that when the jury heard the 'unexplained possession' charge, it concluded that the appellant was under a legal obligation to come forward with an explanation of his possession of the bills and that this obligation could be satisfied only through the trial testimony of the appellant. * * *"

dependent of any testimony by the accused, that the accused need not testify, and that no inference could be drawn from his failure to testify (see note 6 and pp. 7–9, *supra;* Tr. 126, 127). As we have shown, defense counsel urged the jury to credit precisely such independent evidence as a satisfactory explanation of petitioner's possession. Here, even more clearly than in *Gainey,* the instructions as a whole cannot fairly be understood as a comment on petitioner's failure to testify.

The fact that the possession that must be explained is itself an essential element of the offense is immaterial. For the reasons stated above, the distinction drawn by the *Cameron* court is unsound; it has been ignored even by the Fifth Circuit in subsequent decisions (see note 20, *supra*). That court's focus upon the single phrase "unexplained possession" would be particularly inapplicable here, where the judge told the jury, "You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole" (Tr. 113).

b. EVEN IF THE INSTRUCTION WAS IMPROPERLY GIVEN, THE ERROR WAS HARMLESS

Petitioner was convicted not only of possessing the Nettie Lewis and Mary Hernandez checks but also of forging and uttering them. The jury must, therefore, have believed beyond a reasonable doubt that petitioner wrote the payee's signature on each of those checks. The forging of a Treasury check stolen from the mail implies that the forger knew the checks were

stolen. It suggests that the jury would have found petitioner guilty of knowingly possessing stolen checks even without the challenged instruction.

The suggestion is fortified by the fact that the jury apparently placed controlling weight upon the testimony of the government handwriting expert. The evidence with respect to the four counts charging possession of the Lewis, Hernandez, Young, and Salazar checks was substantially the same. The difference was that the handwriting expert testified he was sure that petitioner signed the payees' names on the Lewis and Hernandez checks, while he was unsure about the signatures on the Young and Salazar checks. The instruction on the inference from unexplained possession was given with respect to all four checks, but the jury found petitioner not guilty of possessing the Young and Salazar checks. They apparently relied, not on the permissible inference of knowledge from unexplained possession, but on the more direct evidence of petitioner's having forged two of the checks.

In these circumstances, any error in instructing the jury on the inference was harmless. This Court reached a similar conclusion in *Turner*. The jury there had been told that possession of heroin without appropriate tax stamps was *prima facie* evidence that the possessor had violated the statute, which made it unlawful to purchase, sell, dispense or distribute a narcotic drug not in or from the original tax-stamped package. The Court held that the instruction was proper because it was reasonable to infer that one

possessing heroin had purchased it from an unstamped package. But it held alternatively that any error was harmless.

It explained that to convict, the jury must have believed that Turner possessed the drug, but that the only evidence of possession was that he had 275 glassine bags of heroin. "This evidence, without more, solidly established that Turner's heroin was packaged to supply individual demands and was in the process of being distributed, an act barred by the statute" (396 U.S. at 420). Applying the rule that conviction on an indictment charging several acts in the conjunctive must be sustained if the evidence is sufficient as to any of those acts, the Court held that the evidence was sufficient as to distributing the drug and that any error in the inference instruction was harmless.

Similarly, the jury here must have believed that petitioner forged the checks. This alone, without regard to the authorized inference, "solidly established" (*Turner, supra*) that petitioner knew the checks were stolen.[2] Though the indictment here did not charge acts in the conjunctive, the evidence was sufficient, even without the inference, to support a guilty verdict on the single act charged—possessing the checks knowing them to have been stolen.

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[2] Though one could hypothesize that petitioner found the checks and did not know they were stolen, one could as easily have hypothesized in *Turner* that the 275 glassine bags were for Turner's own use. Neither hypothesis precludes a finding of harmless error, however, because each is based upon mere speculation and not upon reason grounded in the evidence.

II

A VIOLATION OF 18 U.S.C. 1708 IS ESTABLISHED BY SHOWING THAT THE DEFENDANT KNEW THAT THE PROPERTY HE POSSESSED WAS STOLEN; IT IS UNNECESSARY TO SHOW THAT HE KNEW IT WAS STOLEN FROM THE MAIL

THE STATUTE AND ITS HISTORY SHOW THAT CONGRESS INTENDED TO PROHIBIT THE POSSESSION OF STOLEN MAIL WITH KNOWLEDGE THAT IT WAS STOLEN, WITHOUT REQUIRING KNOWLEDGE THAT IT WAS STOLEN FROM THE MAIL

Under 18 U.S.C. 1708, it is a crime to buy, receive, conceal, or possess any article stolen from the mail "knowing the same to have been stolen" (see pp. 2-3, *supra*). The language is unambiguous. It requires proof of only two elements: that the article was stolen from the mail, and that the defendant knew it was stolen. It does not require that he knew it was stolen from the mail.

The statute's legislative history confirms that this was the intent of Congress. The predecessor of 18 U.S.C. 1708 originally proscribed possession of articles stolen from the mail "knowing the same to have been *so* stolen" (18 U.S.C. (1934 ed.) 317; emphasis added). Early decisions of the lower federal courts construed the clause as requiring proof that the accused knew the article was stolen specifically from the mail. See, *e.g.*, *Brandenburg* v. *United States*, 78 F. 2d 811 (C.A. 3).

In response to those holdings, Congress amended the statute in 1939 to eliminate that requirement by removing the word "so" preceding the word "stolen." The House committee report stated it was the pur-

pose of the amendment to allow conviction "without requiring the Government to prove also that the defendant knew the property received had been stolen from the mails."[24] It was anticipated that the amendment would restrict the market for stolen mail.[25]

Since this amendment, the few courts that have considered this issue have agreed that the element of knowledge under Section 1708 is established by a showing that the defendant knew the items he possessed were stolen. See *United States* v. *Hines*, 256 F. 2d 561 (C.A. 2); *Smith* v. *United States*, 343 F. 2d 539 (C.A. 5); *United States* v. *Gardner*, 454 F. 2d 534 (C.A. 9), certiorari denied, No. 71-6792,

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[24] H. Rep. No. 734, 76th Cong., 1st Sess., p. 1:

"Under the existing statute it is necessary for the Government, in order to secure a conviction for the crime of receiving property stolen from the mails, to prove not only that the property was stolen from the mails and that the receiver knew it was stolen, but also that he knew it was stolen from the mails. The reported bill amends the existing law so that it will sustain a conviction for the Government to prove that the property was in fact stolen from the mails and that the defendant knew the property he received had been stolen. The committee feel that this should be sufficient without requiring the Government to prove also that the defendant knew the property received had been stolen from the mails.

"The Postmaster General, who recommended the enactment of this amendment, in a communication to the Speaker of the House pointed out that defendants have been enabled to escape conviction under the present law by denying that they knew the articles received had been stolen from the mails. He also gives his opinion that this amendment will tend to discourage this form of crime by restricting the market for the stolen articles."

See also S. Rep. No. 861, 76th Cong., 1st Sess.

[25] H. Rep. No. 734, *supra*.

October 10, 1972; *United States* v. *Schultz*, 462 F. 2d 622 (C.A. 9).[26]

B. CONGRESS MAY PROHIBIT THE KNOWING POSSESSION OF STOLEN PROPERTY THAT WAS STOLEN FROM THE MAIL

Petitioner asserts (Br. 11), without citation of authority, that "[t]he only way to properly tie in Federal jurisdiction is to require that the defendant knew these articles were stolen from the United States Mail." Congressional power to protect the mail is not that restricted.

The offense of which petitioner was convicted was possession of property stolen from the mails which he knew was stolen. The basic crime was knowing possession of stolen property. The fact that the theft had been from the mails was significant only as a basis for establishing federal jurisdiction. The element of knowledge that the property was stolen is important to insure that innocent possession is not punished. But once the defendant's culpability is established by proof that he knows the property is stolen, there is no reason further to require that he also knows that the theft was from a federal instrumentality.

The broad authority of Congress over the postal

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[26] The two cases relied on by petitioner (Br. 11) do not hold to the contrary. In *Wilson* v. *United States*, 317 F. 2d 363 (C.A. 10), the question was whether the evidence was adequate to show that the matter had in fact reached the mails prior to the theft. In *Allen* v. *United States*, 387 F. 2d 611 (C.A. 5), it was whether the evidence was adequate to show that the matter was stolen before it left the mails. Neither court considered, much less resolved, the issue whether the accused must have knowledge that the matter was stolen from the mail.

system includes the power to prohibit conduct which interferes with the proper operation of the mails. See *Ex parte Jackson*, 96 U.S. 727. Theft from the mails obviously is such conduct, and possession of property that has been stolen from the mails with the knowledge that it is stolen similarly may be prohibited in order to protect the mails.

The lower federal courts have repeatedly and consistently held that in crimes defined by Congress, knowledge of the federal jurisdictional element of the crime is not an element of the offense.[25] The Final Report of the National Commission on Reform of

[25] 18 U.S.C. 2312 (interstate transportation of a stolen vehicle knowing it to be stolen): Knowledge by a defendant that he crossed state lines is not necessary. *Bibbins* v. *United States*, 400 F. 2d 544 (C.A. 9).

18 U.S.C. 2313 (receiving stolen vehicle moving in interstate commerce knowing it to have been stolen): Proof of knowledge that the vehicle has moved across state lines is not necessary. *Overton* v. *United States*, 405 F. 2d 168 (C.A. 5); *Pilgrim* v. *United States*, 266 F. 2d 486 (C.A. 5); *Brubaker* v. *United States*, 183 F. 2d 894 (C.A. 6); *United States* v. *Hamilton*, 456 F. 2d 171 (C.A. 3), certiorari denied, 406 U.S. 947.

18 U.S.C. 2314 (interstate transportation of stolen goods knowing them to be stolen): Knowledge of the goods' having crossed state lines is unnecessary. *United States* v. *Kirschke*, 315 F. 2d 315 (C.A. 6); *United States* v. *White*, 451 F. 2d 559 (C.A. 6), certiorari denied, 405 U.S. 1071; *United States* v. *Miagola*, 424 F. 2d 710 (C.A. 2); *United States* v. *Strauss*, 443 F. 2d 986 (C.A. 1), certiorari denied, 404 U.S. 854; *United States* v. *Masters*, 456 F. 2d 1060 (C.A. 9).

18 U.S.C. 2315 (receiving goods moving as part of interstate commerce knowing them to be stolen): Knowledge that the goods were moving in interstate commerce is unnecessary. *Pugliano* v. *United States*, 348 F. 2d 902 (C.A. 1), certiorari denied, 382 U.S. 939; *United States* v. *Allegretti*, 340 F. 2d 243 (C.A. 7), certiorari denied, 381 U.S. 911; *Corey* v. *United*

Federal Criminal Laws includes suggested provisions expressly negating any requirement that an offender be shown to have had knowledge of the jurisdictional

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States, 305 F. 2d 232 (C.A. 9), certiorari denied, 371 U.S. 956; *United States* v. *Cordo*, 186 F. 2d 144 (C.A. 2), certiorari denied *sub nom. Minkoff* v. *United States*, 340 U.S. 952; *United States* v. *Hamilton*, 456 F. 2d 171 (C.A. 3), certiorari denied, 406 U.S. 947.

18 U.S.C. 1343 (using interstate communication facilities to further a scheme to defraud): Knowledge of use of an interstate facility is unnecessary. *Blassingame* v. *United States*, 427 F. 2d 329 (C.A. 2), certiorari denied, 402 U.S. 945.

18 U.S.C. 2113(c) (receiving money taken from a federally insured bank): Knowledge that the money was from a federally insured bank is unnecessary. *Nelson* v. *United States*, 415 F. 2d 483 (C.A. 5), certiorari denied, 396 U.S. 1060.

18 U.S.C. 641 (theft and receipt of property of the United States): Knowledge that property knowingly converted belongs to the government is unnecessary. *United States* v. *Howey*, 427 F. 2d 1017 (C.A. 9); *United States* v. *Boyd*, 446 F. 2d 1267, 1274 (C.A. 5); cf. *Findley* v. *United States*, 362 F. 2d 921 (C.A. 10).

18 U.S.C. 1952 (traveling in or utilizing interstate commerce to facilitate an unlawful activity): Knowledge that interstate facilities were used is unnecessary. *United States* v. *Bash*, 258 F. Supp. 807 (N.D. Ind.), affirmed *sub nom. United States* v. *Miller*, 379 F. 2d 183, 187 (C.A. 7), certiorari denied, 389 U.S. 930; *United States* v. *Roselli*, 432 F. 2d 879 (C.A. 9), certiorari denied, 401 U.S. 924; *United States* v. *Hanon*, 428 F. 2d 101 (C.A. 8), certiorari denied, 402 U.S. 952; cf. *United States* v. *Chase*, 372 F. 2d 453 (C.A. 4), certiorari denied, 387 U.S. 907.

18 U.S.C. 111 (assaulting a federal officer): Knowledge that the victim was a federal employee is not necessary. *United States* v. *Goodwin*, 440 F. 2d 1152 (C.A. 3); *United States* v. *Lamont*, 425 F. 2d 636 (C.A. 1); *United States* v. *Kiraly*, 445 F. 2d 291 (C.A. 6), certiorari denied, 404 U.S. 915; *United States* v. *Kartman*, 417 F. 2d 893 (C.A. 9); *United States* v. *Leach*, 429 F. 2d 956 (C.A. 8), certiorari denied, 402 U.S. 986; *United States* v. *Gaechter*, 436 F. 2d 364 (C.A. 7).

element of the offense.[28] We know of no decision holding that federal jurisdiction depends upon the accused's knowledge that his offense could be prosecuted by the federal government.

Petitioner's conduct here—possessing Treasury checks knowing them to have been stolen—would have been an offense under California law as well as federal law.[29] It is no defense to his federal prosecution that he was unaware at the time he received the stolen checks that they had been stolen from the mail and that he would therefore be subject to federal prosecution.

III

PETITIONER WAS PROPERLY GIVEN SEPARATE CONCURRENT SENTENCES FOR THE CRIMES OF FORGING AND UTTERING A SINGLE CHECK

Petitioner was convicted on separate counts of forging and uttering the Lewis and Hernandez checks. In each case the forgery was proved by the testimony of the government handwriting expert, who found that petitioner had signed the payee's name on each check (App. 14);[30] the uttering was proved by the testi-

[28] Section 204 provides: "Except as otherwise expressly provided, culpability is not required with respect to any fact which is solely a basis for federal jurisdiction." The provision is duplicated in proposed Section 302(3)(c).

[29] Cal. Penal Code § 496(1) provides in part:

"Every person who buys or receives any property which has been stolen or which has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, * * * is punishable by imprisonment * * *."

[30] There is thus no substance to petitioner's claim (Br. 23) that the evidence was insufficient to show that he forged the checks.

mony of a bank teller that petitioner deposited each check, bearing the purported signature of the payee and the second endorsement of "Clarence Smith," in his "Smith" account (App. 10–11). The three-year sentences for these four counts were concurrent with each other and concurrent with the three-year sentences for possessing the checks knowing them to have been stolen.

Petitioner argues that separate conviction and sentencing for forging and uttering the same check is "double punishment" in violation of the Eighth Amendment. But since the three-year sentences for all six counts were concurrent, the claim of "double punishment" is wholly hypothetical. Petitioner points to no prejudice that will result from the concurrent sentences on the uttering counts, and there is no occasion for this Court to decide this issue.[31]

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[31] *Benton* v. *Maryland*, 395 U.S. 784, held that the imposition of concurrent sentences did not constitute a jurisdictional bar to consideration of a challenge to a conviction on one or more counts not necessary to sustain the sentence. The Court's opinion did not rule out the application of the concurrent-sentence doctrine "as a principle of judicial efficiency which permits judges to avoid decision of issues which have no appreciable impact on the rights of any party" (*id.* at 792). The courts of appeals have continued to employ the doctrine in this manner in circumstances such as those presented here. See, *e.g.*, *United States ex rel. Epton* v. *Nenna*, 446 F. 2d 363 (C.A. 2); *United States* v. *Adcock*, 447 F. 2d 1337, 1339 (C.A. 2); *United States* v. *Bursaiaux*, 449 F. 2d 1299 (C.A. 5), certiorari denied, 397 U.S. 972; *Turnestad* v. *United States*, 418 F. 2d 1043, 1046 (C.A. 8); *Jordan* v. *United States*, 416 F. 2d 338, 346 (C.A. 9), certiorari denied, 397 U.S. 920; cf. *United States* v. *Spears*, 449 F. 2d 946, 948–949 (C.A. D.C.); *United States* v. *McKenzie*, 444 F. 2d 808 (C.A. 3).

In any event, we submit that, since forgery and uttering involve different acts and are distinct crimes, they may be separately punished. In deciding whether separate punishment may be imposed for related criminal acts, or for a single act that violates two statutory provisions, this Court has looked to the congressional intent in enacting the particular statute to determine whether separate punishment was contemplated. Thus, in *Gore* v. *United States,* 357 U.S. 386, the Court upheld consecutive sentences upon separate convictions for selling narcotics not pursuant to a written order form, selling narcotics not in or from the original stamped package, and facilitating the concealment and sale of narcotics. Each of these was based upon a single sales transaction. The Court found that Congress intended in these three separate provisions to provide separate punishment even if all three were violated in the course of one transaction. See, also, *Blockburger* v. *United States,* 284 U.S. 299, 304:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. * * * [2]

[2] Similarly, in *Callanan* v. *United States,* 364 U.S. 587, the issue was whether consecutive sentences could be imposed for convictions under the Hobbs Anti-Racketeering Act for obstructing interstate commerce by extortion and for conspiring to do so. The Court held that, in view of the long-established distinction between a substantive offense and a conspiracy to commit it, and in the absence of a contrary indication of legislative intent, the two offenses could be separately punished.

On the other hand, where it has appeared that Congress intended only a single punishment, or where its intent was ambiguous, separate sentences have been held unlawful. See *Bell* v. *United States*, 349 U.S. 81 (simultaneous transportation of more than one woman in violation of Mann Act is a single offense); *Prince* v. *United States*, 352 U.S. 322 (robbery of a federally insured bank and entering the bank with intent to commit a felony may not be punished separately); *Heflin* v. *United States*, 358 U.S. 415 (robbery of a federally insured bank and receiving the proceeds are not separately punishable); *Ladner* v. *United States*, 358 U.S. 169 (single act of assault affecting two federal officers is a single offense).

Although, as this Court has noted "[t]here is no significant legislative history illuminating [18 U.S.C.] 495 or any of its predecessors" (*Gilbert* v. *United States*, 370 U.S. 650, 655), the face of the statute indicates that forging and uttering a Treasury check are separate offenses which may be separately punished. Section 495 (set forth at pp. 3–4, *supra*) creates three separate crimes: forgery of a writing to obtain any sum of money from the United States; the uttering of such a writing, knowing it to be forged, with intent to defraud the United States; and the transmitting of such a writing, knowing it to be forged, in support of a claim with intent to defraud the United

States. Each of these provisions proscribes a separate act which is not necessarily linked to the others.[33] One can forge a writing without uttering or transmitting it; one can utter a forged writing without having been the forger. Congress could reasonably determine that the commission of both acts should be punishable with more severity than the commission of only one or the other, because two separate wrongs are involved.

The courts of appeals have thus treated forgery and uttering as distinct crimes under various statutes. See, *e.g.*, *Read* v. *United States*, 299 Fed. 918, 921–922 (C.A. D.C.); *United States* v. *Maybury*, 274 F. 2d 899, 903–904 (C.A. 2); *United States* v. *Wilson*, 441 F. 2d 655 (C.A. 2); *French* v. *United States*, 232 F. 2d 736 (C.A. 5), certiorari denied, 352 U.S. 851; *Barker* v. *Ohio*, 328 F. 2d 582 (C.A. 6); *United States* v. *Huggins*, 184 F. 2d 866 (C.A. 7); *Ross* v *United States*, 374 F. 2d 97 (C.A. 8), certiorari denied, 389

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[33] At common law, too, the crimes were distinct. Forgery was "the fradulent making or alteration of a writing, to the prejudice of another man's right" (4 Blackstone, *Commentaries*, p. 247 (1900)); "the offence of forgery may be complete, though there be no publication or uttering of the forged instrument" (Gabbett, *Criminal Law*, p. 350 (1843)). Uttering was committed "when one by words or writing pronounceth or publisheth the deed, &c. to any other as true." 3 *Coke's Institutes*, p. 171 (1797). It was "an offence distinct from, though connected with, the act of false making or forgery * * *." 2 East, *Pleas of the Crown*, p. 973 (1803).

U.S. 882; *Wiley* v. *United States*, 144 F. 2d 707 (C.A. 9); *DeMaurez* v. *Squier*, 144 F. 2d 564 (C.A. 9).

This is not a case such as *Bell* or *Ladner*, where a single act has been punished as two offenses; nor is it a situation like *Prince* or *Heflin*, where one offense is a lesser form of the other which Congress did not intend to be punished separately. Petitioner was convicted of two separate acts with respect to each check. Conviction of those offenses required proof of different facts for each. Neither forgery nor uttering is a lesser form of the other, and there is no reason to think that Congress meant to preclude double punishment for one who commits both offenses. As in *Callanan*, *supra*, "[t]his is an ordinary case of a defendant convicted of violating two separate provisions of a statute, whereby Congress defined two historically distinctive crimes composed of differing components" (364 U.S. at 597).[4]

[4] Petitioner also asserts (Br. 23) that he "was denied equal protection by the failure of the government to supply him with an independent handwriting expert." Under 18 U.S.C. 3006A (e)(1), counsel for an indigent defendant may request, in an *ex parte* application, authority to obtain at government expense "investigative, expert, or other services necessary for an adequate defense * * *." If the cost of those services is not more than $150, counsel is authorized to obtain them in advance of authorization, subject to later review by the court. 18 U.S.C. 3006A(e)(2). There is nothing in the record to show that counsel sought or was denied authorization for obtaining the services of a handwriting expert.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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MARCH 1973.

SUPREME COURT OF THE UNITED STATES

Syllabus

BARNES *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72–5443. Argued March 20, 1973—Decided June 18, 1973

Petitioner was convicted of possessing United States Treasury checks stolen from the mails, knowing them to be stolen; forging; and uttering the checks, knowing the endorsements to be forged. The District Court instructed the jury that "[p]ossession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen." The Court of Appeals affirmed, finding no lack of "rational connection" between unexplained possession of recently stolen property and knowledge that the property was stolen. *Held:* The instruction comports with due process. Pp. 4–10.

(a) If a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable doubt standard (*i. e.*, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process. Pp. 4–6.

(b) Here, where the evidence established that petitioner possessed recently stolen Treasury checks payable to persons he did not know and it provided no plausible explanation for such possession consistent with innocence, the traditional common law inference satisfies the reasonable doubt standard, the most stringent standard applied by the Court in judging permissive criminal law inferences, and, therefore, comports with due process. Pp. 6–8.

(c) Although the introduction of any evidence, direct or circumstantial, tending to implicate the defendant in the alleged crime increases the pressure on him to testify, the mere massing

Syllabus

of evidence against him cannot be regarded as a violation of his privilege against self-incrimination. *Yee Hem* v. *United States*, 268 U. S. 178, 185. P. 9.

(d) In light of its legislative history and consistent judicial construction, the statute requires only knowledge that the checks were stolen, and not knowledge that they were stolen from the mails. P. 10.

466 F. 2d 1361, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 72-5443

James Edward Barnes, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 18, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

Petitioner Barnes was convicted in United States District Court on two counts of possessing United States Treasury checks stolen from the mails, knowing them to be stolen, two counts of forging the checks, and two counts of uttering the checks, knowing the endorsements to be forged. The trial court instructed the jury that ordinarily it would be justified in inferring from unexplained possession of recently stolen mail that the defendant possessed the mail with knowledge that it was stolen. We granted certiorari to consider whether this instruction comports with due process. 409 U. S. 1037 (1972).

The evidence at petitioner's trial established that on June 2, 1971, he opened a checking account in the pseudonym "Clarence Smith." On July 1, and July 3, 1971, the United States Disbursing Office at San Francisco mailed four Government checks in the amounts of $269.02, $154.70, $184.00, and $268.80 to Nettie Lewis, Albert Young, Arthur Salazar, and Mary Hernandez, respectively. On July 8, 1971, petitioner deposited these four checks into the "Smith" account. Each check bore the apparent endorsement of the payee and a second endorsement by "Clarence Smith."

At petitioner's trial the four payees testified that they had never received, endorsed, or authorized endorsement of the checks. A Government handwriting expert testified that petitioner had signed the "Clarence Smith" endorsement on all four checks and that he had signed the payees' names on the Lewis and Hernandez checks.[1] Although petitioner did not take the stand, a postal inspector testified to certain statements made by petitioner at a post-arrest interview. Petitioner explained to the inspector that he received the checks in question from people who sold furniture for him door-to-door and that the checks had been signed in the payees' names when he received them. Petitioner further stated that he could not name or identify any of the salespeople. Nor could he substantiate the existence of any furniture orders because the salespeople allegedly wrote their orders on scratch paper that had not been retained. Petitioner admitted that he executed the Clarence Smith endorsements and deposited the checks but denied signing the payees' endorsements.[2]

The District Court instructed the jury that "[p]ossession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen."[3]

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[1] The witness' findings with respect to the Young and Salazar signatures were inconclusive.

[2] This explanation of petitioner's possession of the checks, presented through the postal inspector's testimony, was adopted by petitioner's counsel in argument to the jury. Tr. 107–108.

[3] The full instruction on the inference arising from possession of stolen property stated:

"Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circum-

The jury brought in guilty verdicts on all six counts, and the District Court sentenced petitioner to concurrent three-year prison terms. The Court of Appeals for the Ninth Circuit affirmed, finding no lack of "rational connection" between unexplained possession of recently stolen property and knowledge that the property was stolen. 466 F. 2d 1361 (1972). Because petitioner received identical concurrent sentences on all six counts, the court declined to consider his challenges to conviction on the forgery and uttering counts. We affirm.

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stances shown by the evidence in the case, that the person in possession knew the property had been stolen.

"However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property.

"The term 'recently' is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

"If you should find beyond a reasonable doubt from the evidence in the case that the mail described in the indictment was stolen, and that while recently stolen the contents of said mail here, the four United States Treasury checks, were in the possession of the defendant you would ordinarily be justified in drawing from those facts the inference that the contents were possessed by the accused with knowledge that it was stolen property, unless such possession is explained by facts and circumstances in this case which are in some way consistent with the defendant's innocence.

"In considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of constitutional rights the accused need not take the witness stand and testify.

"Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the accused." Tr. 123–124.

I

We begin our consideration of the challenged jury instruction with a review of four recent decisions which have considered the validity under the Due Process Clause of criminal law presumptions and inferences. *Turner* v. *United States*, 396 U. S. 398 (1970); *Leary* v. *United States*, 395 U. S. 6 (1969); *United States* v. *Romano*, 382 U. S. 136 (1965); *United States* v. *Gainey*, 380 U. S. 63 (1965).

In *Gainey* v. *United States*, *supra*, the Court sustained the constitutionality of an instruction tracking a statute which authorized the jury to infer from defendant's unexplained presence at an illegal still that he was carrying on "the business of a distiller or rectifier without having given bond as required by law." Relying on the holding of *Tot* v. *United States*, 319 U. S. 463, 467 (1942), that there must be "a rational connection between the facts proved and the fact presumed," the Court upheld the inference on the basis of the comprehensive nature of the "carrying on" offense and the common knowledge that illegal stills are secluded, secret operations. The following Term the Court determined, however, that presence at an illegal still could not support the inference that the defendant was in possession, custody or control of the still, a narrower offense. "Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt—'the inference of the one from proof of the other is arbitrary. . . .' *Tot* v. *United States*, 319 U. S. 463." *Romano* v. *United States*, *supra*, 382 U. S., at 141.

Three years after *Romano* the Court in *Leary* v. *United States*, *supra*, considered a challenge to a statutory inference that possession of marihuana, unless satisfac-

torily explained, was sufficient to prove that the defendant knew that the marihuana had been illegally imported into the United States. The Court concluded that in view of the significant possibility that any given marihuana was domestically grown and the improbability that a marihuana user would know whether his marihuana was of domestic or imported origin, the inference did not meet the standards set by *Tot*, *Gainey*, and *Romano*. Referring to these three cases, the *Leary* Court stated that an inference is " 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U. S., at 36. In a footnote the Court stated that since the challenged inference failed to satisfy the more-likely-than-not standard, it "need not reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use." *Id.*, n. 4.

Finally, in *Turner* v. *United States*, *supra*, decided the year following *Leary*, the Court considered the constitutionality of instructing the jury that it may infer from possession of heroin and cocaine that the defendant knew these drugs had been illegally imported.[4] The Court noted that *Leary* reserved the question of whether the

[4] The *Turner* Court also considered the validity of inferring that a defendant knowingly purchased, sold, dispensed, or distributed a narcotic drug not in or from the original package bearing tax stamps from the fact that the drugs had no tax stamps when found in the defendant's possession. 26 U. S. C. § 4704 (a) (1964 ed.). The Court upheld the inference that a defendant possessing unstamped heroin knowingly purchased it in violation of the statute, but struck down the inference with regard to cocaine. 396 U. S., at 419–424.

more-likely-than-not or the reasonable doubt standard controlled in criminal cases, but it likewise found no need to resolve that question. It held that the inference with regard to heroin was valid judged by either standard. 396 U. S., at 416. With regard to cocaine, the inference failed to satisfy even the more-likely-than-not standard. 306 U. S., at 419.

The teaching of the foregoing cases is not altogether clear. To the extent that the "rational connection," "more-likely-than-not," and "reasonable doubt" standards bear ambiguous relationships to one another, the ambiguity is traceable in large part to variations in language and focus rather than to differences of substance. What has been established by the cases, however, is at least this: that if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process.

In the present case we deal with a traditional common law inference deeply rooted in our law. For centuries courts have instructed juries that an inference of guilty knowledge may be drawn from the fact of unexplained possession of stolen goods. Thayer, writing in his Preliminary Treatise on Evidence (1898), cited this inference as the descendant of a presumption "running through a dozen centuries." [5] At 327. Early American

[5] Thayer also described the historical development of the presumption:

". . . [T]he laws of Ine [King of Wessex, A. D. 688–725] provide that, 'if stolen property be attached with a chapman, and he have not brought it before good witnesses, let him prove . . . that he was neither privy (to the theft) nor thief; or pay as *wite* (fine) xxxvi shillings.' To be found thus in the possession of stolen goods

cases consistently upheld instructions permitting conviction upon such an inference,[6] and the courts of appeals on numerous occasions have approved instructions essentially identical to the instruction given in this case.[7] This longstanding and consistent judicial approval of the instruction, reflecting accumulated common experience, provides strong indication that the instruction comports with due process.

This impressive historical basis, however, is not in itself sufficient to establish the instruction's constitutionality. Common law inferences, like their statutory counterparts, must satisfy due process standards in light of present-day experience.[8] In the present case the challenged

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was a serious thing; if they were recently stolen, then was one 'taken with the mainour,'—a state of things that formerly might involve immediate punishment, without a trial; and, later, a trial without a formal accusation; and, later still, a presumption of guilt which, in the absence of contrary evidence, justified a verdict, and at the present time is vanishing away into the mere judicial recognition of a permissible inference . . . ." (Citations omitted.) At 328.

[6] See, *e. g.*, *Wilson* v. *United States*, 162 U. S. 613 (1896); *Commonwealth* v. *Millard*, 1 Mass. 6 (1804); *Knickerbocker* v. *People*, 43 N. Y. 177 (1870); *State* v. *Raymond*, 46 Conn. 345 (1878); *Cook* v. *State*, 84 Tenn. 461 (1886).

[7] *E. g.*, *United States* v. *Russo*, 413 F. 2d 432 (CA2 1969); *United States* v. *Smith*, 446 F. 2d 200 (CA4 1971); *United States* v. *Winbush*, 428 F. 2d 357 (CA6 1970), cert. denied, 400 U. S. 918 (1970); *United States* v. *Hood*, 422 F. 2d 737 (CA7 1970), cert. denied, 400 U. S. 820 (1970); *United States* v. *Dilella*, 354 F. 2d 584 (CA7 1965).

[8] The reasoning of the statutory inference cases is applicable to analysis of common law inferences. Cf. *United States* v. *Gainey*, *supra*, 380 U. S., at 70; Rules of Evidence for United States Courts and Magistrates (proposed November 20, 1972), Rule 303 (a), 56 F. R. D. 183, 212. Common law inferences, however, present fewer constitutional problems. Such inferences are invoked only in the discretion of the trial judge. While statutes creating criminal law inferences may be interpreted also to preserve the trial court's traditional discretion in determining whether there is sufficient evidence to go to the jury and in charging the jury, *Turner* v. *United States*,

instruction only permitted the inference of guilt from *unexplained* possession of recently stolen property.[9] The evidence established that petitioner possessed recently stolen Treasury checks payable to persons he did not know, and it provided no plausible explanation for such possession consistent with innocence. On the basis of this evidence alone common sense and experience tell us that petitioner must have known or been aware of the high probability that the checks were stolen. Cf. *Turner* v. *United States*, *supra*, 396 U. S., at 417;[10] *Leary* v. *United States*, *supra*, 395 U. S. at 46. Such evidence was clearly sufficient to enable the jury to find beyond a reasonable doubt that petitioner knew the checks were stolen. Since the inference thus satisfies the reasonable doubt standard, the most stringent standard the Court has applied in judging permissive criminal law inferences, we conclude that it satisfies the requirements of due process.[11]

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supra, 396 U. S., at 406, n. 6; *United States* v. *Gainey*, *supra*, 380 U. S., at 68–70, such discretion is inherent in the use of common law inferences.

[9] Of course, the mere fact that there is some evidence tending to explain a defendant's possession consistent with innocence does not bar instructing the jury on the inference. The jury must weigh the explanation to determine whether it is "satisfactory." *Ante*, n. 3. The jury is not bound to accept or believe any particular explanation any more than it is bound to accept the correctness of the inference. But the burden of proving beyond a reasonable doubt that the defendant did have knowledge that the property was stolen, an essential element of the crime, remains on the Government.

[10] " 'Common sense' . . . tells us that those who traffic in heroin will inevitably become aware that the product they deal in is smuggled, unless they practice a studied ignorance to which they are not entitled."

[11] It is true that the practical effect of instructing the jury on the inference arising from unexplained possession of recently stolen property is to shift the burden of going forward with evidence to the defendant. If the Government proves possession and nothing more, this evidence remains unexplained unless the defendant in-

II

Petitioner also argues that the permissive inference in question infringes his privilege against self-incrimination. The Court has twice rejected this argument,[12] *Turner* v. *United States, supra,* 396 U. S., at 417–418, *Yee Hem* v. *United States,* 268 U. S. 178, 185 (1925), and we find no reason to re-examine the issue at length. The trial court specifically instructed the jury that petitioner had a constitutional right not to take the witness stand and that possession could be satisfactorily explained by evidence independent of petitioner's testimony. Introduction of any evidence, direct or circumstantial, tending to implicate the defendant in the alleged crime increases the pressure on him to testify. The mere massing of evidence against a defendant cannot be regarded as a violation of his privilege against self-incrimination. *Yee Hem* v. *United States, supra,* 268 U. S., at 185.

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troduces evidence since ordinarily the Government's evidence will not provide an explanation of his possession consistent with innocence. In *Tot* v. *United States, supra,* the Court stated that the burden of going forward may not be freely shifted to the defendant. See also *Leary* v. *United States, supra,* 395 U. S., at 44–45. *Tot* held, however, that where there is a "rational connection" between the facts proved and the fact presumed or inferred, it is permissible to shift the burden of going forward to the defendant. Where an inference satisfies the reasonable doubt standard, as in the present case, there will certainly be a rational connection between the fact presumed or inferred (in this case, knowledge) and the facts the Government must prove in order to shift the burden of going forward (possession of recently stolen property).

We do not decide today whether a judge-formulated inference of lesser age or less widely accepted may properly be emphasized by means of a jury instruction.

[12] Nor can the instruction "be fairly understood as a comment on the petitioner's failure to testify." *United States* v. *Gainey, supra,* 380 U. S., at 70–71.

III

Petitioner further challenges his conviction on the ground that there was insufficient evidence that he knew the checks were stolen *from the mails*. He contends that 18 U. S. C. § 1708 [13] requires knowledge not only that the checks were stolen, but specifically that they were stolen from the mails. The legislative history of the statute conclusively refutes this argument [14] and the courts of appeals that have addressed the issue have uniformly interpreted the statute to require only knowledge that the property was stolen.[15]

Since we find that the statute was correctly interpreted and that the trial court's instructions on the inference to be drawn from unexplained possession of stolen property were fully consistent with petitioner's consti-

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[13] ". . . Whoever . . . unlawfully has in his possession any . . . mail . . . which has been stolen . . . , knowing the same to have been stolen, . . . [shall be fined or imprisoned or both]."

[14] Prior to 1939 the statute required proof of possession of articles stolen from the mail "knowing the same to have been *so* stolen." 18 U. S. C. § 317 (1934 ed.) (emphasis added). See, *e. g.*, *Brandenburg* v. *United States*, 78 F. 2d 811 (CA3 1935). In 1939 Congress eliminated the word "so" preceding the word "stolen." H. R. Rep. No. 734, 76th Cong., 1st Sess., p. 1 (1939), explains the change:

"The reported bill amends the existing law so that it will sustain a conviction for the Government to prove that the property was in fact stolen from the mails and that the defendant knew the property he received had been stolen. The committee feel that this should be sufficient without requiring the Government to prove also that the defendant knew the property received had been stolen from the mails."

See also S. Rep. No. 864, 76th Cong., 1st Sess (1939).

[15] *United States* v. *Hines*, 256 F. 2d 561 (CA2 1958); *Smith* v. *United States*, 343 F. 2d 539 (CA5 1965), cert. denied, 382 U. S. 861 (1965); *United States* v. *Gardner*, 454 F. 2d 534 (CA9 1972), cert. denied, 409 U. S. 867 (1972); *United States* v. *Schultz*, 462 F. 2d 622 (CA9 1972).

tutional rights, it is unnecessary to consider petitioner's challenges to his conviction on the forging and uttering counts.[16]

Affirmed.

[16] Although affirmance of petitioner's conviction on two of the six counts carrying identical concurrent sentences does not moot the issues he raises pertaining to the remaining counts, *Benton* v. *Maryland*, 395 U. S. 784 (1969), we decline as a discretionary matter to reach these issues. Cf. *United States* v. *Romano*, *supra*, 382 U. S., at 138.

SUPREME COURT OF THE UNITED STATES

No. 72-5443

James Edward Barnes, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 18, 1973]

MR. JUSTICE DOUGLAS, dissenting.

Possession of stolen property is traditionally under our federal system a local law question. It becomes a federal concern in the present case only if the "mail" was implicated. The indictment, insofar as the unlawful possession counts are concerned, charges that the items had been "*stolen from the mail.*" While there was evidence that these items had gone through the mail, petitioner did not take the stand, nor was there any evidence that petitioner knew that the items had been "stolen from the mail." As to the possession counts in the indictment the District Court charged the jury that "three essential elements" were required to prove the possession offenses:

> "FIRST: The act or acts of unlawfully having in one's possession the contents of a letter, namely, the United States Treasury checks as alleged;
>
> "SECOND: That the contents of the letter, namely, the United States Treasury checks as alleged, were stolen from the mail; and
>
> "THIRD: That the defendant James Edward Barnes knew the contents had been stolen."

The District Court also charged the jury:

> "If you should find beyond a reasonable doubt from the evidence in the case that the mail described in the indictment was stolen, and that while

> recently stolen the contents of said mail here, the four United States Treasury checks, were in the possession of the defendant you would ordinarily be justified in drawing from those facts the inference that the contents were possessed by the accused with knowledge that it was stolen property, unless such possession is explained by facts and circumstances in this case which are in some way consistent with the defendant's."

As noted by the Court the Act, which originally required proof of possession of articles stolen from the mail "knowing the same to have been so stolen," 18 U. S. C. § 317 (1934 ed.), was changed by eliminating the word "so" before "stolen." H. R. Rep. No. 734, 76th Cong., 1st Sess., p. 1. And the Act under which petitioner was charged and convicted does not require as an ingredient of the offense that petitioner knew the property had been stolen from the mails.

That, however, is the beginning, not the end of the problem. For without a nexus with the "mail" there is no federal offense. How can we rationally say that "possession" of a stolen check allows a judge or jury to conclude that the accused knew the check was *stolen from the mails*. We held in *Tot* v. *United States*, 319 U. S. 463, that where a federal Act made it unlawful for any convicted person to possess a firearm that had been shipped in interstate or foreign commerce, it was unconstitutional to presume that a firearm possessed by

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[1] *Tot* v. *United States* was decided in 1943, four years after the amendment by Congress of the 1939 amendment to the present Act eliminating the need to prove knowledge that the property had been stolen from the mails. Had *Tot* been decided before 1939 it is inconceivable that Congress would have made the 1939 change in the present Act.

such person had been received in interstate or foreign commerce.[1] The decision was unanimous. The vice in *Tot* was that the burden is on the government in a criminal case to prove guilt beyond a reasonable doubt and that use of the presumption shifts that burden. We said: ". . . it is not permissible thus to shift the burden by arbitrarily making one fact, which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation." *Id.*, at 469. The use of presumptions and inferences to prove an element of the crime is indeed treacherous, for it allows men to go to jail without any evidence on one essential ingredient of the offense. It thus implicates the integrity of the judicial system. We held in *In re Winship*, 397 U. S. 358, 364, that the Due Process Clause requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime. . . ." Some evidence of wrongdoing is basic and essential in the judicial system, unless the way of prosecutors be made easy by dispensing with the requirement of presumption of innocence, which is the effect of what the Court does today. In practical effect the use of these presumptions often means that the great barriers to the protection of procedural due process contained in the Bill of Rights are subtly diluted.[2]

May Congress constitutionally enact a law that says juries can convict a defendant without any evidence at all from which an inference of guilt could be drawn? If *Thompson* v. *Louisville*, 362 U. S. 199, means anything, the answer is in the negative. The Congress is as unwarranted in telling courts what evidence is enough to convict an accused as we would be to tell Congress

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[2] Justice Black and I previously have voiced this concern. *Turner* v. *United States*, 396 U. S. 398, 425 (dissenting opinion); *United States* v. *Gainey*, 380 U. S. 63, 72, 74 (dissenting opinions).

what criminal laws should be enacted. That seems inescapably plain by the regime of separation of powers under which we live.

In *Leary* v. *United States*, 395 U. S. 6, we held that it was constitutionally impermissible to presume that one who possessed marihuana would be presumed to know of its unlawful importation. We said it would be sheer "speculation" to conclude that even a majority of the users of the plant knew the source of it. *Id.*, at 53. The overall test, we said, was whether it can be said "with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Id.*, at 36.

In that case there were some statistics as to quantity of marihuana grown here and the amount grown abroad that enters the country. There was evidence of the characteristics of local and foreign marihuana, and the like.

Stolen checks may be the product of local burglaries of private homes or offices.

Stolen checks may come from purses snatched or purloined.

Property checks may involve any one of numerous artifices or tricks.

In other words, there are various sources of stolen checks which in no way implicate federal jurisdiction.

Checks stolen from national banks, checks stolen from federal agencies, checks lifted from the mails are other sources.

But unlike *Leary* we have no evidence whatsoever showing what amount of stolen property, let alone stolen checks, *implicate the mails*. Without some evidence or statistics of that nature we have no way of assessing the likelihood that this petitioner knew that these checks were *stolen from the mails*. We can take judicial notice that checks are stolen from the mails. But it would

take a large degree of assumed omniscience to say with "substantial assurance" that this petitioner more likely than not knew from the realities of the underworld that this stolen property came *from the mails.* But without evidence of that knowledge there would be no federal offense of the kind charged.

The step we take today will be applauded by prosecutors, as it makes their way easy. But the Bill of Rights was designed to make the job of the prosecutor difficult. There is a presumption of innocence. Proof beyond a reasonable doubt is necessary. The jury, not the court, is the factfinder. These basic principles make the use of these easy presumptions dangerous.[3] What we do today is, I think, extremely disrespectful of the constitutional regime that controls the dispensation of criminal justice.

[3] What we said in *Christoffel* v. *United States*, 338 U. S. 84, 89, that "all elements of the crime charged shall be proved beyond a reasonable doubt" has been the guiding rule at least on the issue of guilt. And it is cogently argued that presumptions of the existence of elements of a crime have no place in our constitutional framework. See 22 Stan. L. Rev. 341 (1970). That seems indubitably true to me at least in the present case where knowledge that the checks were stolen from the mails has only suspicion to support it.

SUPREME COURT OF THE UNITED STATES

No. 72-5443

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[June 18, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

Petitioner was charged in two counts of a six-count indictment with possession of United States Treasury checks stolen from the mails, knowing them to be stolen. The essential elements of such an offense are (1) that the defendant was in possession of the checks, (2) that the cheks were stolen from the mails, and (3) that the defendant knew that the checks were stolen. The Government proved that petitioner had been in possession of the checks and that the checks had been stolen from the mails; and, in addition, the Government introduced some evidence intended to show that petitioner knew or should have known that the checks were stolen. But rather than leaving the jury to determine the element of "knowledge" on the basis of that evidence, the trial court instructed them that they were free to infer the essential element of "knowledge" from petitioner's unexplained possession of the checks. In my view, that instruction violated the Due Process Clause of the Fifth Amendment because it permitted the jury to convict even though the actual evidence bearing on "knowledge" may have been insufficient to establish guilt beyond a reasonable doubt. I therefore dissent.

We held in *In re Winship*, 397 U. S. 358, 364 (1970), that the Due Process Clause requires "proof beyond a

reasonable doubt of every fact necessary to constitute the crime . . . ." Thus, in *Turner* v. *United States*, 396 U. S. 398, 417 (1970), we approved the inference of "knowledge" from the fact of possessing smuggled heroin because "'[c]ommon sense' . . . tells us that those who traffic in heroin will *inevitably* become aware that the product they deal in is smuggled . . . ." (Emphasis added.) The basis of that "common sense" judgment was, of course, the indisputable fact that all or virtually all heroin in this country is necessarily smuggled. Here, however, it cannot be said that all or virtually all endorsed United States Treasury checks have been stolen. Indeed, it is neither unlawful nor unusual for people to use such checks as direct payment for goods and services. Thus, unlike *Turner*, "common sense" simply will not permit the inference that the possessor of stolen Treasury checks "*inevitably*" knew that the checks were stolen. Cf. *Leary* v. *United States*, 395 U. S. 6 (1969).

In short, the practical effect of the challenged instruction was to permit the jury to convict petitioner even if they found insufficient or disbelieved all of the Government's evidence bearing directly on the issue of "knowledge." By authorizing the jury to rely exclusively on the inference in determining the element of "knowledge," the instruction relieved the Government of the burden of proving that element beyond a reasonable doubt. The instruction thereby violated the principle of *Winship* that every essential element of the crime must be proved beyond a reasonable doubt.